No. 8055

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation, and H. J. BARBEY,

*Appellants*

*vs.*

THE UNITED STATES OF AMERICA

*Appellee*

Appeal from the District Court of the United States for the District of Oregon.

# Brief of Appellants


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**The questions involved and how they arise may be thus summarized:**

1. Are Oregon and Washington indispensable parties to this suit?

The question arises on the pleadings (Tr., pp. 5, 13, 14, 20, 23, 24, 26, 27); the petitions of Oregon and Washington for leave to intervene and denial thereof (Tr., pp. 92 et seq.); the evidence which dis-

closed the interest of each of the States (Tr., pp. 198 to 217, 293, 294 to 299, 305-306); Findings of Fact Nos. 1, 2, 3, 6 and Conclusions of Law Nos. 1, 2, 4, 6 (Tr., pp. 47 to 56), and the decree in accordance with said Findings that appellee was the owner of the premises in controversy, that the same were accretions to Sand Island, and fixing and establishing the boundary line between the two States (Tr., pp. 60, 61, 62); and Assignments of Error Nos. III, XVII, XVIII, XIX, XXII to XXVII (Tr., pp. 70, 71, 72, 73).

2. Did the Court err in refusing to enter a decree of dismissal because of absence of indispensable parties, and because the evidence wholly failed to establish that appellee is the owner of the premises in controversy?

This question arises on the pleadings, the Findings of Fact and Conclusions and Decree, supra, and Assignments of Error Nos. XXII, XXV, XXVI, XXVII (Tr., pp. 72, 73).

3. Did the Court err in denying the petition of the State of Oregon, and the petition of the State of Washington, for leave to intervene?

This question arises upon the pleadings, supra, the order and opinion of the Court (Tr., pp. 92, et seq), the decree (Tr., p. 62), the evidence and Assignments of Error Nos. XXII, XXIII, XXIV, and XXVI (Tr., p. 72).

4. Did the Court err in finding and fixing the boundary line between the two States?

This question arises upon the pleadings, supra, Finding of Fact No. 2, and Conclusions of Law No. 2 (Tr., pp. 48, 54), and the decree in accordance therewith (Tr., pp. 60, 61), and Assignments of Error Nos. I, III, VI, XVII, XVIII, XXVI (Tr., pp. 66, 67, 68, 70, 71, 72).

5. Does the evidence sustain the Findings and Decree that appellants were trespassing, or threatening to trespass upon any property of appellee, or that appellants were trespassing or threatening to trespass upon the premises in controversy, whether they belonged to appellee or to someone else?

The question arises on the pleadings (Tr., pp. 13, et seq.); the evidence later discussed, Findings of Fact Nos. 1, 2, 3, 6, 7, 8, and Conclusions of Law Nos. 1, 2, 4, 5, 6, 7, 8 (Tr., pp. 48 to 57), and the Decree (Tr., pp. 60, 61, 62), and Assignments of Error Nos. I to VI; IX to XIV, XXI, XXVIII (Tr., pp. 66 to 73).

6. Does the evidence sustain the Findings, Conclusions and Decree that appellee is the owner of the premises in controversy and that the same are accretions to Sand Island?

This question arises on the pleading (Tr., pp. 5 et seq., 13, et seq), the evidence discussed hereafter, Findings of Fact Nos. 1, 2, 3, 6, 7, and Conclusions of Law Nos. 1, 2, 3, 4, 5, 6 (Tr., pp. 47 to 56), the Decree (Tr., pp. 60, 61), and Assignments of Error I to VI, XIV, XVI, XVII, XVIII, XIX, XXV (Tr., pp. 66, 67, 68, 70, 71, 72).

## STATEMENT OF THE CASE

The complaint filed by appellee alleged that appellee was the owner of Sand Island in Oregon, in the lower Columbia River (Tr., pp. 6, 7), and prayed a decree that

> "plaintiff is the owner and entitled to the immediate and exclusive possession thereof, and that the court render a further decree restraining and enjoining the said defendants, and each of them, from using said premises in the manner aforesaid, or at all; that plaintiff recover of and from defendants its costs and disbursements incurred herein." (Tr., pp. 10, 11).

Attached to the original complaint was a plat which, it was alleged in the complaint, delineated

the premises which appellee claimed was Sand Island. The premises thus claimed included a large body of land, 150 to 200 acres, lying southerly and southwesterly of Sand Island. The only controversy in the case was whether this body of land, all above low water and part above high water at all times, belonged to the State of Washington or to the State of Oregon, or part to each, or was an accretion to Sand Island, and thus belonged to appellee.

The original complaint was filed August 15, 1934. An amended complaint was filed about a month later and to this amended complaint an answer was filed by appellants on October 9, 1934 (Tr., p. 13). On June 10, 1935, the day before the trial began, appellee filed a second amended complaint (Tr., p. 5). It was stipulated that the answer to the first amended complaint should stand as the answer to the second amended complaint (Tr., p. 95), and an order to this effect was entered (Tr., p. 12).

The answer admitted, what was never denied by any one, that appellee owns Sand Island under grant from the State of Oregon, made by the Act of the Legislative Assembly of October 21st, 1864, denied that the map attached to the original complaint, and referred to in each amended complaint, accurately shows the main, middle or north ship channel of the Columbia River, and

"extending south and southeasterly from Cape Disappointment is a body of land commonly referred to as Peacock Spit; that said Peacock Spit extends to a point west and south of Sand Island, is not a part thereof, but is now, and for many years last past was, a body of land having no connection with and constituting no part of Sand Island (Tr., pp. 13, 14).

* * * *

"* * * In this connection, the defendants allege that what the plaintiff in truth and in fact complains of in the amended complaint, and what it in terms alleged and complained of in the original complaint herein, was that the defendants under what purported to be a lease of a part of Peacock Spit from the State of Washington, and which was a lease lawfully entered into, the defendants were fishing said part of Peacock Spit described in the lease from the State of Washington, the plaintiff asserting in said original complaint, what in truth and in fact it seeks to assert in the amended complaint, that that portion of Peacock Spit leased to the defendants as aforesaid by the State of Washington, is in fact within the State of Oregon. The situs of fishing operations of which the plaintiff complains is not on Sand Island but on Peacock Spit (Tr., p. 18).

* * * *

"In May, 1928, the defendant, Baker's Bay Fish Company, leased from the State of Washington, for fishing purposes, certain parts of Peacock Spit, being the identical area embraced within the lease which said defendant now has with the State of Washington. On or about

June 4, 1931, said lease was cancelled by the State of Washington and said premises reappraised and a lease thereon was offered at public auction to the highest bidder, and said premises were again leased to defendant, Baker's Bay Fish Company, by the State of Washington for a period ending in December, 1932. Thereafter, and on December 22, 1932, the said premises were again leased to defendant, Baker's Bay Fish Company, by the State of Washington. That attached hereto, marked Exhibit A and made a part of this answer, is a true copy of the lease last referred to, bearing date December 22, 1932 (Explanation, see Exhibit 21 Tr., p. 294). That said lease is still in full force and effect. On December 28, 1932, defendant, Baker's Bay Fish Company, assigned and transferred unto the defendant, H. J. Barbey, a half interest in said lease, which transfer was consented to and approved by the State of Washington on January 5, 1933. Said lease is the identical lease referred to in Paragraph IX of the original complaint herein, wherein it was alleged that the defendants

> 'fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as "Peacock Spit", but which were, in fact, lands which lie between low water mark and high water mark on a "spit" wholly within the boundaries of the State of Oregon, and a part of Sand Island.'

"That said premises so leased from the State of Washington are the premises upon which the defendants have been carrying on the fishing operations referred to in the original

> complaint, and in the amended complaint, and said fishing operations have been confined entirely to the premises described in said lease. The premises upon which the defendants keep horses and maintain structures, referred to in Paragraph XI of the original complaint, and Paragraph IX of the amended complaint, are the premises described in said lease with the State of Washington (Tr., pp. 19, 20)."

The answer further pleaded among other things, that the States of Washington and Oregon were indispensable parties to the suit (Tr., p. 27).

It will be observed that the answer set up various leases made by the State of Washington to one or more of the appellants at different times. The first lease here material was dated May 7, 1928, for five years, annual rental of $36,000.00, and was executed by the State of Washington to Baker's Bay Fish Company, one of appellants (Defts.' Ex. 22, Tr., p. 298). After this lease had run for three years, it was cancelled by mutual agreement, because of change in economic conditions, and another lease executed by the State of Washington to Baker's Bay Fish Company for a term of two years, dated June 1, 1931. The annual rental was $7500.00 a year (Defts.' Ex. 23, Tr., p. 299). An interest in this lease was assigned by Baker's Bay Fish Company to the other appellants.

On December 22, 1932, the lease dated June 1, 1931, was terminated by mutual consent, and

another lease executed by the State of Washington to Baker's Bay Fish Company for five years, at an annual rental of $5000.00 (Defts.' Ex. 21, Tr., p. 294). An interest in this lease was assigned to the other appellants. Under these leases up to and including 1934, the appellants had paid the State of Washington as rentals about $133,000.00.

The leased premises in these leases were identical and were described as situated in Pacific County, Washington, and being

> "That portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of Lot 4, Section 9, Township 9 north, Range 11 west, W. M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River."

The Court will readily see, upon an examination of the maps for 1928, 1929, 1930, 1931 and 1932, the years when these several leases were executed, just what was meant by Peacock Spit lying southeasterly of the Main Channel Range. These maps are a part of Government's Exhibit No. 1.

The original complaint filed in this suit on August 15, 1934 (Tr., p. 306, Govt.'s Ex. 25), as we construe the allegations of Paragraph IX, clearly identified the premises described in these several

leases as the premises in dispute in this suit.

It is, therefore, apparent that appellee, at the time this suit was brought, and for some time prior thereto, knew that the State of Washington claimed the premises in controversy and for a number of years had leased them and collected large rentals.

The answer, for the purpose of showing the interest of the State of Washington, its claim of title, and exhibiting the reasons why it was an indispensable party, further alleged that the courts of Washington had for many years assumed jurisdiction over the premises covered by said leases, and cited the cases (Tr., p. 23); also the opinion of the Attorney General of the United States, given on March 20, 1925 (Op. Atty. Gen., Vol. 34, pp. 428-435), to the effect that Peacock Spit was in Washington, that that state might legally permit fishing upon and in the vicinity thereof and upon all other tide lands lying within one and one-half miles of the southerly point of Cape Disappointment (Tr., p. 24). It was also alleged that in 1930, the United States, as trustee for certain Indian tribes, brought two suits in the District Court of the United States, for the Western District of Washington, Southern Division, one against appellant, Baker's Bay Fish Company, lessee of the State of Washington, and another against McGowan, in which Baker's Bay Fish Company intervened. In each of these suits

it was alleged by the United States that the premises leased by the State of Washington to Baker's Bay Fish Company, which lease covered the premises in dispute in this suit, were located in the State of Washington.

The claim of the United States in those suits was that the lessees from the State of Washington were interfering with treaty fishing rights of certain Indian tribes (Tr., pp. 25, 26). The particular lease involved in said suits is in evidence as Defendants' Exhibit 22 (Tr., p. 298). In those suits, Judge Cushman took jurisdiction, obviously on the assumption that the premises were in the State of Washington, and held that the treaty rights of the Indians were not being violated (U. S. v. Baker's Bay Fish Co., et al; U. S. v. McGowan, et al; 2 Fed. Supp. 426). The decision of Judge Cushman was affirmed by this Court on January 16, 1933 (62 Fed. (2d) 955) and by the Supreme Court of the United States (290 U. S. 592, 78 L. Ed. 522, Tr., pp. 25-26). At that time, as now claimed by appellee in this suit, the leased property involved in that litigation was partly or wholly in Oregon, was a part of Sand Island and belonged to appellee.

The claim of Oregon to a considerable part of the premises in dispute was definitely made and insisted upon for years before this suit was brought. In 1928, the State of Oregon leased to

Columbia Fishing Company, a body of land, then and at all times thereafter above low water, which is now located in the very heart of the premises in controversy. It is the tract outlined with a heavy red line on the 1934 map, a part of Government's Exhibit 1, and lies south of the westerly end of Sand Island. The property leased at that time by the State of Oregon was surveyed in 1928 by Mr. McLean (Tr., pp. 224, 230, 245). The lease then made by Oregon was for five years from November 27, 1928. The rent reserved was four cents a pound on all food fish taken with drag seines landed on the leased property, with a minimum annual payment of not less than $4250 (Tr., p. 293, Defts.'s Ex. 20). The lessee fished two seasons under this lease. As to what occurred thereafter regarding this lease, a witness for the government testified (Trans., pp. 205-206):

> "The lease made in 1928 by the Oregon State Land Board, which I referred to, was not only for a period of one year, it was for a period of either three or five years. The sands were building up, there was some fishing done on them in 1929, and then the lease was subsequently cancelled because the State of Washington claimed the sands belonged to it and threatened to prosecute Barbey, and of course, if prosecutions were undertaken and sustained the gear would be confiscated, and we advised Mr. Barbey not to take a chance of being arrested and having valuable gear confiscated. I told the State Land Board he didn't want to get into a controversy between the two states,

and the lease was cancelled, I think, in 1930. Barbey was the president of Columbia Fishing Company, to which the lease was made.

* * * *

"I think a correction should be made. I said the 1928 lease of the State Land Board to Columbia Fishing Company had been cancelled by the State Land Board for the reason I gave in my testimony. Since that testimony was given, Mr. Wade, an assistant to the Attorney General of Oregon, has told me that there was no formal cancellation made by the State Land Board. Apparently what happened, the Columbia Fishing Company paid two years' rent, and, for the reasons stated yesterday, that is, threats by the State of Washington, the Columbia Fishing Company just quit operating on the sands. * * *"

For some time before the second amended complaint was filed and the trial begun, the State Land Board of Oregon had under consideration the matter of leasing the premises covered by the lease made by it in 1928, and this was known to appellee. All this was proved by evidence introduced by appellee (Tr., pp. 198 et seq). Indeed, appellee was entirely familiar with the claims of title made by Oregon, what it had done in the past in the assertion of title to and dominion over part of the premises in controversy, and what it was proposing to do at the time of the trial, and had been for some time before (Tr., pp. 198 to 218). It will be observed that, while the case was begun

August 15, 1934, it did not come on for trial until June 11, 1935, although the original complaint alleged a continuing substantial trespass to the irreparable injury of appellee. No restraining order was issued, and none applied for. Probably one reason why the case did not come on earlier was that the two District Judges for Oregon were, or felt that they were, disqualified to sit in the case, and it was necessary to have some judge from another district assigned to try the case. There was some delay and difficulty in getting an outside judge assigned (Tr., p. 198). Judge Cavanah finally came to Portland and opened the trial June 11, 1935.

The second amended complaint was filed the day before and the issues upon which the case was tried were finally made up by the stipulation entered into the day the trial began (Tr., p. 95). At that time, the State of Washington, appearing by its Attorney General, moved for leave to intervene and file its petition in intervention, claiming title to the premises in dispute. At the same time, the State of Oregon made a like motion. The appellee objected to the granting of leave to either state. The Court, in an oral opinion, denied the motion of each state. Leave to intervene was not denied in the asserted exercise of discretion, or because new or collateral issues would be introduced. The appellee in its complaint alleged that

it was the owner of the premises in controversy. The issue presented by the State of Washington was that it was the owner of the premises, and the issue presented by the State of Oregon was that it was the owner. The learned trial court knew exactly what the respective claims were. Everyone else connected with the litigation had known of them for some time before the case was called for trial. The appellants never claimed any title to the premises; disclaimed any claim of title in their answer and alleged whatever rights they had were dependent upon a lease executed by the State of Washington. What is said in the oral opinion of the learned trial court makes it entirely clear that the Court understood that appellee claimed title to the premises in controversy, that Washington made claim of title and that Oregon made claim of title, and that there was a controversy over the ownership of property between the appellee and the two states. The petitions for leave to intervene were denied because the Court was of the view that there was a federal statute which vested in the Supreme Court of the United States exclusive jurisdiction to try controversies between the United States and a state affecting the title to property; that the District Court could not adjudicate upon the claims of a state, and that if the states were permitted to

intervene, jurisdiction of the Court would be ousted (Tr., pp. 92 et seq).

The learned trial court also refused to permit the State of Washington, lessor of appellants, to produce or examine witnesses, present an argument or in any way participate in the trial. It also refused to permit the State of Oregon to participate in any way in the trial (Tr., p. 96).

In Oregon, and also in Washington, on the Columbia River, fishing operations may be carried on from May 1st to August 25th, and from September 10th to March 1st. These periods are the "open seasons". The balance of each year the river is closed to fishing (Tr., p. 103). Appellants carried on no fishing operations after August 25, 1934. The operations carried on by appellants were what are known as drag seine fishing. A drag seine is not a floating gear. By means of a drag seine, fish are landed on the shore. A drag seine is a net or web some 220 to 250 fathoms in length, and about six fathoms wide. Along the top is a float line of cork or other light material. Along the bottom is a lead line and the web of the seine hangs between these two lines. When in water deep enough to accommodate it, a drag seine has something of the appearance of a very long, wide tennis net hanging in the water supported by the float line and held in a vertical position by the lead line. In operation, one end is held to the shore and the

seine is then carried out in a wide semi-circle and drifted with the tide. When the drift is made the free end is pulled ashore, usually with horses, and when the operation has been completed, both ends of the seine are on shore and the fish which have been caught are landed (Tr., pp. 133, 134).

Because of seasonal fish runs and other conditions in the lower Columbia, drag seine fishing is only carried on a couple of months each year. It usually begins some time in June and ends on August 25th, which terminates the open summer season (Tr., p. 269).

Appellants did not fish or attempt to fish in 1935 on the premises in controversy under their lease with Washington, or at all. At the Fall election, held in 1934, the people of Washington passed a law (Initiative Law No. 77, Chap. 1, Laws of Wash. 1935) and Section 6 prohibited the use of drag seines and the issuance of licenses by the State of Washington for such operations within the state on the Columbia River. A witness for the Government testified (Tr., p. 204):

> "In the State of Washington there is a lease out on Peacock Spit which the State of Washington claims takes in all of these sands. Oregon claims it owns part of the sands. In Washington, I don't think since last Fall, a drag seine license might be issued because of an initiative bill passed by the people of Washington in 1934. The question of the constitu-

> tionality of the law was argued in the Supreme Court of Washington some weeks ago, as I understand it. * * *"

The Act was held constitutional by the Supreme Court of Washington (State ex rel Campbell v. Case, 47 Pac. (2d) 24).

Thus it appears that at the time the first amended complaint was filed, and at the time the second amended complaint was filed, appellants were not fishing, or threatening to fish, on any property belonging to appellee, or any of the premises in controversy. It had no lease from the State of Oregon to go upon the premises claimed by that state. It could not procure fishing licenses in the State of Washington to carry on operations on the premises covered by the lease from that state. This embraced all of the premises in question. Since August 25, 1934, when drag seine fishing operations ended for that season, appellants have not used, occupied, gone upon or threatened to use, occupy or go upon any part of the premises in question, or any other property claimed by appellee. This is all made plain by evidence introduced by appellee (Tr., pp. 198 et seq). At the time of the trial there was no controversy except as to who owned the premises in question, that is, whether they were owned by the United States, or by Washington, or by Oregon, or part of each state. This was the unescapable situation because when Oregon

was admitted into the Union it became the owner of all beds and banks to high water mark of the navigable waters in the state and of all tide-land sand bars, sand spits, tide flats, etc., in these waters and has remained the owner thereof, and all accretions thereto, except such as it has granted away. The same is true of the State of Washington. It follows, as a necessary consequence, that the premises in question belong to the one state or the other, unless they are accretions to Sand Island.

In Washington v. Oregon (211 U. S. 127, 53 L. Ed. 118, 214 U. S. 205, 53 L. Ed. 969), the Supreme Court of the United States was called upon to fix the boundary line between the two states. The contention of Washington at that time was that the north ship channel was south of Sand Island and the contention of Oregon was that the north ship channel, as described in the Act of Congress, approved February 14, 1859, admitting Oregon into the Union (Tr., p. 14), passed between Sand Island and Cape Disappointment to the north and northeast in and through Baker's Bay. The Supreme Court sustained the contention of Oregon. However, it did not fix an unvarying boundary line, but rather a varying line. The court fixed the boundary line as the middle of the north ship channel, but recognized that the location of the median line might change from time to time by accretions and with these changes would come a

shifting in the boundary line. The Court said (211 U. S. 135):

> "It is true the middle of the north ship channel may vary through the processes of accretion. It may narrow in width, may become more shallow, and yet the middle of that channel will remain the boundary."

The Court further said (page 136):

> "Concede that today, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size; yet, when did the condition of the two channels change so far as to justify transferring the boundary to the south channel? When and upon what condition could it be said that grants of land or of fishery rights made by the one state ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand Island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?
>
> "These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accre-

> tion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river.
>
> * * * *
>
> "Our conclusion, therefore, is in favor of the State of Oregon, and that the boundary between the two states is the center of the north channel, changed only as it may be from time to time through the processes of accretion."

Upon rehearing (214 U. S. 205, 215), the Court said:

> "So, whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years, from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel."

The Supreme Court cited, and applied the rule theretofore announced, in Nebraska v. Iowa (143 U. S. 359, 36 L. Ed. 186) in which it was said (pp. 366, et seq):

> " 'As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants of each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river, are in nowise

changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before; so that, if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains; but nature alone produces this change; she destroys the land of the one, while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits.

" 'But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring states, the bed which it has abandoned becomes, thenceforward, their boundary and remains the property of the former owner of the river (Sec. 267), and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the State in which it flows.'

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit, the center of the abandoned channel."

We refer to these cases and quote from the opinions for the purpose of showing the basis for the respective claims of the States of Oregon and Washington.

Washington, as we understand it, claims that the north ship channel, within the meaning of the decision of the Supreme Court of the United States in Oregon v. Washington, supra, is that channel between Peacock Spit and Sand Island, and close to the latter leading from the Columbia River into Baker's Bay, as shown on the maps for the years 1923 to 1931 (Govt.'s Ex. 1). These maps show that the only charted channel from the Columbia River to Baker's Bay area between Sand Island and Peacock Spit, was the channel close to Sand Island. On the 1932 map, there is no channel charted either between the premises in controversy or at the break across Peacock Spit, which occurred a couple of years before. On the 1933 map, there is a channel charted at the break through Peacock Spit, and so on the map of 1934. In February, 1928, the "North Bend" went ashore on the westerly or ocean side of Peacock Spit. The point where it went ashore is shown on the map of 1928. During heavy storms in the latter part of January, and the early part of February, 1929, the "North Bend" worked its way across the Spit, a distance of several thousand feet, and dropped into the channel between Peacock Spit and Sand

Island, which, by the way, was then the only channel leading to the north into Baker's Bay. The vessel had a length of about 225 feet over all and a hold depth of about 14 feet. When it dropped into the channel it was full of water and drew about 20 feet. It was pumped out and taken to Astoria through this channel. Evidently, the later action of the water widened and deepened the gash cut across Peacock Spit by the "North Bend" (Test. of Mr. Cherry, Tr., pp. 218, 219). Speaking of this, he said:

> "I would not exactly say there was a channel left where the vessel worked its way across Peacock Spit. There was a place where she went through, but you would hardly call it a channel; it was a sort of a gash in the sand (Tr., p. 220)."

On the 1930 map, at about the place where the "North Bend" cut across Peacock Spit, there is shown a strip of clear water, but it is not charted. Again on the 1931 map, and also on the 1932 map, there is shown a strip of clear water; that is, an area below low water, as yet uncharted. On the 1933 map, there is a charted channel shown across Peacock Spit, with a minimum depth of five feet. The same channel is shown on the 1934 map, with a minimum of six feet.

It is the claim of the State of Washington that the north ship channel is the channel close to Sand

Island, that the median line of that channel marks the boundary between the two states, and that this boundary remains at the point at which Sand Island and the body of sand to the south and west came together, as shown on the maps for 1931, 1932, 1933 and 1934. The position of the State of Washington, as we understand it, is that the channel which cut across Peacock Spit, separating it into two parts, was the result of the heavy storms of 1929, and the gash cut by the "North Bend"; that it did not become the north ship channel because it was not the result of the processes of accretion, but, rather, that of violent and sudden change in the nature of avulsion, which did not shift the boundary line. The contention of the State of Oregon, as we understand it, is that when a channel was cut across Peacock Spit, as a result of the gash cut by the "North Bend", or through other causes, that channel became the north ship channel and the median line thereof the boundary between the two states.

What is here in dispute is that large body of land, all above low water and some above high water at the time, lying south and east of the cross cut gash or channel and separated by it from the balance of Peacock Spit.

It will be observed that the entire area above and below this cross cut channel is designated as

"Peacock Spit" on the map of 1929 and later maps. A large cross is in the center of the premises in dispute and the charted channel is still between these premises and Sand Island in 1931. Reference to a cross which is a coordinate marking the undersection of Latitude 46° 16′ and longtitude 124° 02′ appearing on various maps will aid in fixing locations. The 1932 map also shows the premises in dispute, the large body of land south and southwest of Sand Island, with a strip of clear but uncharted water separating it from the balance of Peacock Spit. On the 1932 map for the first time the channel between Sand Island and the premises in controversy is not charted, but is clearly shown. The 1933 map shows that this body of land made contact with Sand Island at one point, but there is still a channel between it and Sand Island the greater part of the distance. On the 1934 map, clear water is still shown between the premises in controversy and Sand Island except for a short distance to the west and north.

It is the contention of appellants that the premises in controversy are not accretions to Sand Island, and do not belong to appellee, and that the findings and decree that they are accretions to Sand Island and belong to the United States are wholly unsupported by the evidence. Later in this brief, we will discuss at some length the evidence upon this phase of the case. Although the States

of Oregon and Washington were denied the right to intervene, to become parties to the suit, or to participate therein in any way, practically all of the evidence introduced by appellee and by the appellants dealt with the question, and the only question in the case, whether the premises in controversy were owned by Washington, or by Oregon, or in part by each, or were owned by the appellee as accretions to Sand Island. There was no controversy then as to whether appellants were trespassing, or threatening to trespass, on any property claimed by appellee, including the premises in dispute. They were not at any time in 1935 trespassing upon or threatening to trespass upon any of these premises. They had no lease from the State of Oregon to go upon any property claimed by it. Because of the Initiative Law passed in Washington, they could not procure drag seine licenses in Washington. They were not carrying on any fishing operations, could not do so, and were not threatening to do so, on any of the premises in question in 1935, and could not do so in any subsequent year unless they could procure a lease at public auction from the State of Oregon, and the Initiative Law referred should be repealed in the State of Washington. There is no dispute as to this.

The trial court, among other things, found that the appellee was the owner of Sand Island and all

the premises in dispute as accretions thereto; that the premises were very valuable for fishing purposes; that appellants have threatened in the past and at the time the findings were made and decrees entered were threatening to enter upon these premises and to carry on fishing operations thereon to the irreparable injury of appellee (Tr., pp. 48, 49, 52, 56, 61).

The Court also made findings as to the location of the boundary line between the two states. The finding is that the middle of the new channel which cuts across Peacock Spit is the boundary line between the states (Tr., pp. 34, 48). The Court decreed that appellee was the owner and entitled to the immediate and exclusive possession of Sand Island and (Tr., pp. 60, 61):

> "The said Sand Island is bordered on the north and east by a body of water styled as Baker Bay, on the south by the main body of the Columbia River, and on the west by a channel of water leading from Baker Bay into the main Columbia River, which said channel is commonly known and referred to as the North ship channel of the Columbia River;
>
> "That said description embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to the sands and tide flats situate along the southerly and westerly shore of said Island, which it is hereby decreed have become a part and parcel of Sand Island by process of accretion. For a more

> particular description of Sand Island, reference is made to the map and chart hereto attached marked exhibit 'A', and made a part hereof. The area designated on Sand Island as 'Sands' and colored in yellow, is the area which is hereby decreed to have formed as an accretion to Sand Island."

and enjoined the appellants from going upon the said premises decreed to be accretions to Sand Island for any purpose except under permit or lease from the appellee, and that appellee should recover from appellants its costs and disbursements (see map, Tr., p. 58).

In the complaint it is alleged that about the 1st of May, 1930, two of appellants entered into a lease (Govt.'s Ex. 3, Tr., p. 100) with appellee covering sites 1, 2, 3, 4 and 5 on Sand Island for seining purposes, and that the premises upon which the appellants carried on their fishing operations, after this lease with appellee was cancelled, was on the sites described in this lease. The lease referred to was executed March 27, 1930, by the Secretary of War for a period of five years, beginning May 1, 1930, annual rental $37,175. It was executed pursuant to the Act of July 28, 1892, and was

> "subject to revocation at the will of the Secretary of War and the uses and occupation of the premises were subject to such rules and regulations as the Commanding Officer at Fort

Stevens, Oregon, should from time to time prescribe."

Under this lease, fishing operations were carried on until August 25, 1931, and at no time thereafter (Tr., p. 103). The lease was cancelled by the Secretary of War on May 10, 1932 (Tr., p. 214). There were various reasons for the cancellation. Appellants had requested it because of a change in economic conditions and the shoaling up of some of the sites. The cancellation apparently fitted in with the plans of the War Department, because the program of the Engineers called for the construction of a number of dikes projecting into the river from the south shore of Sand Island, and these dikes were to be located on the fishing sites covered by the lease which would make seining operations impracticable.

The construction of some of the dikes was begun in 1932 and continued through 1933 and 1934 (Tr., pp. 114, 119). The locations of these dikes are shown on the maps for 1932, 1933 and 1934. It will be noted that the 1932 map shows one dike completed. The 1933 map shows two others in process of construction, the most westerly being immediately east of the tip of the land in controversy. The 1934 map shows three dikes completed (Govt.'s Ex. 1).

Now it is quite impossible that the fishing operations carried on by the appellants under lease

with the State of Washington in 1932, 1933 and 1934, should be on the premises described in the lease from the Secretary of War. Page 102 of the transcript is a plat or map attached to the lease from the United States, canceled May 10, 1932. It covers the south shore of Sand Island from the easterly tip thereof west a distance of about 18,000 feet, or about 3½ miles. The lease is only to low water mark, beyond which appellee had no rights. The projecting lines, shown on this map, running south and at right angles to the shore line, do not indicate the then low water limits, but merely define the projected side lines of the sites. The lease is only for drag seine fishing operations. The most easterly tip of the premises in controversy are south of Site 1 and part of Site 2, and west of the other sites. The evidence is that practically all of the fishing operations under the lease from the United States were on Sites 3 and 4. Site 5 was snagged, as were Sites 1 and 2, and these sites were of very little or no value for fishing. In fishing operations on Sand Island, the fish were landed along the shore line marked by the heavy line. It is a black line on the map at page 102 of the Transcript and, of course, is a heavy white line on the blueprint maps making up Government's Exhibit 1.

It will be recalled that the operations under the leases to appellants from the State of Washington began as early as 1928, and that in 1928 and 1929,

fishing operations were carried on on a part of the premises now in dispute under lease from the State of Oregon. In the meantime, operations were being carried on at the sites on Sand Island under lease from the Secretary of War up to August 25, 1931.

The operations carried on by appellants in 1932, 1933 and 1934, and prior years, under leases from the State of Washington, were always on lands designated on the government maps as Peacock Spit. In these operations the drag seines were always put out on the ocean side of the land, distant from the shore line of Sand Island. The fish, when gathered up on the shore after a drift, were loaded into wagons and hauled across these sands to the docks at the inshore side. Throughout all these fishing operations, up to and including 1934, on the premises in controversy, docks, buildings, etc., were maintained on these sands and always on the inshore side, and these docks extended into waters constituting the channel between the premises upon which the fishing operations were being carried on and Sand Island. Indeed, with respect to the fishing operations in 1934, although the premises upon which the fishing operations were being carried on had united with Sand Island, at one point, the dock which served the fishing operations was built out from these premises northward into the channel between them and Sand

Island. The boats reached this dock and carried in supplies and carried away fish through a channel which came in around the premises in controversy immediately west of the most westerly dike and thence close to the shore line of Sand Island. The undisputed evidence is that, from 1920 on, the westerly and southerly shore line of Sand Island opposite the premises in controversy, was slowly but constantly eroding and receding. The two bodies of land come into contact through the building up of and accretions to the land in dispute.

We will discuss the evidence more at length in connection with our contention that the Findings and Decree that appellee is the owner of the premises in controversy, is wholly unsupported by the evidence.

## SPECIFICATION OF ERRORS RELIED ON

The District Court erred in the following particulars:

(a) In denying the petition of the State of Washington for leave to intervene (Tr., pp. 92, et seq., 62); Assignment of Error XXIII (Tr., p. 72).

(b) In denying the petition of the State of Oregon to intervene (Tr., pp. 92, et seq, 62); Assignment of Error XXIV (Tr., p. 72).

(c) In finding and decreeing that neither the State of Oregon nor the State of Washington was an indispensable party (Tr., p. 62); Assignment of Error XXVI (Tr., p. 72).

(d) In denying the motion of appellants and refusing to dismiss the bill of complaint as amended for want of jurisdiction, and because of the absence of indispensable parties (Tr., p. 62); Assignments of Error XXII, XXVI, XXVII (Tr., p. 72).

(e) In finding and decreeing that appellee was the owner of the premises in controversy, and that the same were accretions to Sand Island; Assignments of Error I to VI, XVII, XVIII, XIX, XXV (Tr., pp. 66, 67, 68, 70, 71, 72).

(f) In finding and fixing by decree the boundary line between the States of Oregon and Washington; Assignments of Error I, III, V, XVII, XVIII, XIX (Tr., pp. 67, 68, 70, 71).

(g) In finding and holding that the premises in controversy were an accretion to Sand Island and that the appellee was the owner and in exclusive possession thereof for many years,

or at all; Assignments of Error I to VI, XVII, XVIII, XIX, XXVI (Tr., pp. 66, 67, 70, 71).

(h) In finding and decreeing that the southerly and southwesterly shore line of Sand Island abuts and faces upon the main body of the Columbia River, and that the south and southwest shore line of Sand Island is adapted to and valuable for the drawing of seines and fishing gear; Assignments of Error Nos. VII, VIII (Tr., p. 68).

(i) In finding and decreeing that sites Nos. 1, 2, 3, 4 and 5 described in the lease dated March 27, 1930, between the United States as lessor and appellants H. J. Barbey and Columbia River Packers Association, lessee, embraces any part of the premises in dispute, and that the appellant used or occupied said sites, or any part thereof, after August 25, 1931; Assignments of Error Nos. IX, X, XI (Tr., pp. 68, 69).

(j) In finding and decreeing that the appellants, or either thereof, threatened or intended to enter upon, or entered upon, Sand Island or any part thereof; Assignments of Error Nos. XI, XII (Tr., pp. 69, 70).

(k) In finding and decreeing that unless restrained appellants will occupy and use said fishing sites for fishing operations during the season of

1935, or succeeding years; Assignment of Error No. XIII (Tr., p. 70).

(l) In finding and decreeing that the appellants, or either thereof, entered upon, or intended to enter upon any part of Sand Island, or any part of the premises in dispute, to conduct fishing operations thereon in 1935, or succeeding years; Assignments of Error Nos. X, XI, XII, XIII, XIV, XXI (Tr., pp. 69, 70, 71).

(m) In finding and decreeing that appellants never had or enjoyed any right or interest in the premises in dispute except under lease executed by the United States; Assignments of Error Nos. XIV, XX (Tr., pp. 70, 71).

(n) In finding and decreeing that appellants, their officers, etc., should be and are enjoined and restrained from occupying or attempting to occupy the premises in dispute; Assignments of Error Nos. XX, XXI (Tr., p. 71).

(o) In refusing to enter a decree dismissing this suit; Assignment of Error No. XXVII (Tr., p. 73).

(p) In decreeing that appellee should recover from appellants its costs and disbursements; Assignment of Error No. XXVIII (Tr., p. 73).

**The subject matter of this litigation is the title to a large body of land lying westerly and southwesterly of Sand Island. The State of Washington claims title to the whole thereof. The State of Oregon claims title to all, or a large part thereof. The United States claims title thereto as an accretion to Sand Island. The appellants at no time have claimed title to any part. The two States are indispensable parties.**

California v. Southern Pacific Co., 157 U. S. 229, 249, 39 L. Ed. 683, 690.

Gregory v. Stetson, 133 U. S. 579, 33 L. Ed. 792.

New Mexico v. Lane, et al., 243 U. S. 52, 58, 61 L. Ed. 588, 591.

C. M. & St. P. Co. v. Adams County, et al., 72 Fed. (2d) 816, 818.

Skeen v. Lynch, 48 Fed. (2d) 1044, 1046.

U. S. v. Ladley, 51 Fed. (2d) 756, 757.

## ARGUMENT

The subject matter of this litigation is the title to a large body of land having an area of between 150 and 200 acres, lying westerly and southwesterly of Sand Island. The appellee claims title to these

lands as an accretion to Sand Island. The State of Washington claims title to the whole area. The State of Oregon claims title to all or a substantial part of the tract. The appellants at no time claimed title to these lands, or any part thereof. All this was well known to appellee when the suit was brought. The situation was made clear by the allegations in the answer of appellants, was understood by the learned trial court, as is shown by the oral opinion denying the motions of Oregon and Washington to intervene (Tr., p. 92). We have seen, by what has been said in the Statement of Facts, supra, that the claim of the State of Washington is of long standing. For many years, with the knowledge of appellee, it leased the premises in controversy, deriving a large revenue therefrom. Since May 7, 1928, it has leased these premises to one or the other of the appellants (Tr., pp. 297, 298, 299). It will be recalled that in Paragraph IX of the original complaint, filed by appellee in this suit on August 15, 1934, in evidence as Government's Exhibit 25, it was alleged that appellants (Tr., p. 306):

> "Fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as Peacock Spit, but which were in fact lands which lie between low water mark and high water mark on a spit wholly within the boundaries of the State of Oregon, and a part of Sand Island."

These allegations refer to the premises in controversy. Each of the successive leases by the State of Washington covered the same premises. These premises were involved in the suits brought by the United States, as trustee for certain Indians, against McGowan, and against two of the appellants, in the District Court for the Western District of Washington, Southern Division, decided January 29, 1931, by Judge Cushman (United States as Trustee, etc., v. McGowan; United States as Trustee, etc., v. Baker's Bay Fish Co., et al., 2 Fed. Supp. 426) and affirmed January 16, 1933, by this Court (62 Fed. (2d) 955). And in these suits the government alleged that the premises were in the State of Washington, were leased by the State of Washington, and that the lessees were interfering with the treaty fishing rights of certain Indian tribes.

The claims of the State of Oregon also, as we have seen, were of long standing. A part of the premises in controversy was surveyed and leased by the State of Oregon in 1928, to Columbia Fishing Company for a term of five years (Tr., p. 293). Under this lease, fishing operations were carried on for a time, and then ceased because the State of Washington claimed that the land covered by the lease belonged to it, and threatened to prosecute the Oregon lessee and confiscate its gear if fishing operations did not cease (Tr., pp. 205, 206).

At the time the trial of this suit began, and for some time prior thereto, the State Land Board of the State of Oregon had under consideration the matter of leasing the same premises that it had leased in 1928 (Tr., pp. 198 et seq.). This was known to appellee some time before the second amended complaint was filed on June 10, 1935, and was established by testimony introduced by appellee (Tr., pp. 198 et seq.).

The title to Sand Island was not in dispute (Tr., p. 13). Everybody connected with this litigation, the appellee, the appellants, the learned trial court, all understood, what was made clear by the pleadings and the record, that appellee claimed title to the premises in controversy as an accretion to Sand Island, that the State of Washington claimed title to the premises in controversy, that the State of Oregon claimed title to all or part of the premises, that the appellants made no claim of title to any part, and that the only controversy respecting the title was between appellee and the States of Oregon and Washington. The trial court regarded the location of the boundary line between the two states, a material issue (Tr., p. 34), and made a distinct and very definite finding as to the location of Sand Island (Tr., p. 48). In other words, the Court proceeded to establish the line separating the two states in a suit in which they were denied all opportunity to be heard.

The decree adjudged and decreed that appellee (Tr., pp. 60, 61):

> "is the owner and entitled to the immediate and exclusive possession of the tract of land and island known as Sand Island, which said island is described as follows:
>
> "That certain island commonly known and referred to as Sand Island * * *
>
> "That said Sand Island is bordered on the north and east by a body of water styled as Baker Bay, on the south by the main body of the Columbia River, and on the west by a channel of water leading from Baker Bay into the main Columbia River, which said channel is commonly known and referred to as the North ship channel of the Columbia River;
>
> "that said description embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to the sands and tide flats situate along the southerly and westerly shore of said Island, which is hereby decreed have become a part and parcel of Sand Island by process of accretion. For a more particular description of Sand Island, reference is made to the map and chart hereto attached, marked exhibit 'A' and made a part hereof. The area designated on Sand Island as 'Sands' and colored in yellow is the area which is hereby decreed to have formed as an accretion to Sand Island."

In other words, the learned trial court decreed that the premises claimed by the States of Oregon and Washington was the property of appellee as an accretion to Sand Island.

Upon this record we submit that the States of Oregon and Washington were indispensable parties.

In California v. Southern Pacific Co., 157 U. S. 229, 249, 39 L. Ed. 683, 690, the Supreme Court of the United States had before it a suit in which it announced a rule directly applicable here. The suit was brought in the Supreme Court by the State of California against the Southern Pacific Company. It was alleged, in substance, in the bill, that California on its admission into the Union became the owner of the soil of the beds of the Bay of San Francisco and all the arms thereof; that certain grants, alleged to be unlawful, were made to the City of Oakland, which in turn had made grants to the Southern Pacific Company and others. The City of Oakland was, of course, interested in the title to the grants which it had made. The Court held that any decree passed in the case would materially affect the rights of Oakland and others, because if the relief prayed for by the State of California were granted, the effect would be to impair all grants made by the City of Oakland to others than the Southern Pacific Company, and cloud their titles; that in the absence of the City of Oakland and others, the Court would not pronounce a decree; that if the City of Oakland and others, citizens of California, were made parties, the jurisdiction of the Court would be ousted, hence the bill was dismissed. The Court, in part, said:

"It was held in Mallow v. Hinde, 25 U. S. 12 Wheat. 193 (6:599), that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court if its process cannot reach them, or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. And the court remarked: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court.'

"In Shields v. Barrow, 58 U. S. 17 How. 130 (15:158), the subject is fully considered by Mr. Justice Curtis, speaking for the Court. The case of Russell v. Clarke, 11 U. S. 7 Cranch, 98 (3:281), is there referred to as pointing out three classes of parties to a bill in equity. * * * '3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'

* * * *

"Mr. Daniell thus lays down the general rule: 'It is the constant aim of a court of equity to do complete justice by deciding upon and setttling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.'

* * * *

"Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons, who have an immediate interest in resisting the demands of complainant, are not indispensable parties or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience

* * * *

(P. 255):

"But it was said that, notwithstanding the breadth of the prayer, relief, if accorded, would be confined to the seven specified parcels, and that the decree would not bind those claiming

interests in other parts of the water front, although as to the particular parcels, defendant's lessors, the Central Pacific Railroad Company and the South Pacific Coast Railway Company and its grantor, the Oakland Water Front Company, all corporations, and citizens of California, would be bound. Considered, however, in reference to the main contention of the state, namely, the want of power to make the grant of the entire water front at all, the argument treated the water front as one and indivisible for the purposes of the case. Indeed, it was insisted that even if it were conceded that the legislature could empower a municipality to deal with parts of its water front in the interest of the public by authorizing the construction of improvements to a certain extent, creating so far a proprietary interest in those thus authorized, yet that such action as to portions of the grant, though sustainable if independent thereof, must be regarded as involved in the invalidity of the entire grant. Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as res adjudicata, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open as to future litigation as would be inconsistent with equity and good conscience.

* * * *

"If this court were of opinion that the City of Oakland occupied the position of the successor merely of the town of Oakland; that the grant of the water front to the town was as comprehensive as is claimed by defendant, and that it had not been annulled by any act of the legislature, but also held that the state

had no power to make such grant, then the City of Oakland would be deprived of the rights it claims under the grant, not by the exercise of the legislative power of the state as between it and its municipality, but by a judicial decree in a suit to which the city was not a party.

"And if the proceedings which purported to vest title in the Oakland Water Front Company were held ineffectual, for the same reason, then the latter company would find the foundation of its title swept away in a suit to which it also was not a party.

"This is not an action of ejectment or of trespass quare clausum but a bill in equity, and the familiar rule in equity, as we have seen, is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end such persons should be made parties."

New Mexico v. Lane, et al., 243 U. S. 52, 58, 61 L. Ed. 588, 591, was an original bill filed by the State of New Mexico in the Supreme Court of the United States, against the Secretary of the Interior and the Commissioner of the General Land Office, to establish the asserted title of the state to certain lands under a school land grant and to restrain the Interior Department from disposing of such lands. It appeared that a Mr. Keepers had filed on a part of the land in controversy, and had acquired certain rights therein under the laws of the United States, if the land did not belong to

the state as a part of its school land grant. He was a citizen of New Mexico. Motion to dismiss the bill was filed on the grounds, among others, that the United States was an indispensable party and had not consented to be sued, and that Keepers had acquired an interest in the land and was also an indispensable party. The Court held that the United States was an indispensable party, and also held that Keepers was an indispensable party, that he was a citizen of New Mexico, and that to make him a party would oust the Court of jurisdiction, hence the bill was dismissed.

In Skeen v. Lynch, 48 Fed. (2d) 1044 (certiorari denied 284 U. S. 633), it appeared that Skeen had entered 640 acres of land in a county in New Mexico for agricultural purposes as his homestead. The law under which the land was entered reserved coal and other minerals, together with the right to prospect for, mine and remove the same. Thereafter the Interior Department issued a license or permit to Lynch and others to prospect and drill for oil and gas on the land, and the permittees entered upon the premises and began operations under their permit. Suit was brought by Skeen against the permittees to restrain them from going upon the land to prospect for oil and gas, and to quiet title as against them to oil and gas, upon the ground that the reservation contained in the patent to Skeen only reserved coal and other minerals of

a solid and similar nature to coal. The situation of Lynch and his associates, permittees of the government, was quite like the situation of appellants in this case, lessees from the State of Washington. It was contended by defendants that the United States was an indispensable party for the reason that its title to the oil and gas, if any, under the surface, would be clouded by decree for Skeen. The court sustained this contention and dismissed the bill, in part saying:

> "The bill shows that defendants named claim no interest in the oil and gas other than as permittees and prospective lessees of the United States. The interest of the United States in the subject matter in litigation is not less obvious and substantial than it was in the case of Louisiana v. Garfield, 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92, in which it was held to be an indispensable party. * * * A decree for plaintiff on the first count would be a cloud on the title of the United States, and its permittee and prospective lessee would be subject to ouster if she continued to attorn to the United States. In New Mexico v. Lane, 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588, the state claimed title to forty acres under Congressional grant and prayed that it be adjudged the owner. A certificate of purchase of the forty acres as coal land had been issued to one Keepers by the United States. Held: Keepers was an indispensable party. In California v. Southern Pacific Co., 157 U. S. 229, 15 S. Ct. 591, 599, 39 L. Ed. 683, it was held that 'if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made be-

tween them without affecting the rights of the absent parties', the court cannot proceed with the adjudication in their absence; that 'the familiar rule in equity, * * * is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end, such persons should be made parties'. See, also, American T. & S. Bank v. Scobee, 29 N. M. 436, 224 P. 788. Story's Equity Pleadings (10th Ed.) § 138: 'In the next place, an interest of the absent parties in the subject-matter, ex directo, which may be injuriously affected, is not indispensable to the operation of the rule; for, if the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive and direct, than if the absent parties were before the court, that of itself, will, in many cases, as we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties.' "

In Chicago, M. & St. P. Co. v. Adams County, et al., 72 Fed. (2d) 816, 818, this Court, in part, said:

"An early and able discussion of the entire question of indispensable parties is to be found in the following oft-quoted passage from the opinion of Mr. Justice Curtis, in Shields v. Barrow, 17 How. (58 U. S.) 130, 139, 15 L. Ed. 158. After quoting from Russell v. Clarke's Executors, 7 Cranch 98, 3 L. Ed. 271, the learned jurist continued: 'The court here points out three classes of parties to a bill of equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who

ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'

"The definition of the term 'indispensable party' and the reason for the application of the rule as to such party in the federal courts, was well stated in the leading case of Sioux City Terminal R. & W. Co. v. Trust Co. of N. A. (C. C. A. 8), 82 F. 124, 126, affirmed in 173 U. S. 99, 19 S. Ct. 341, 43 L. Ed. 628: 'The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have no interest in the litigation between the immediate parties, but who have an interest in the subject matter of the litigation, which may be conveniently settled therein, may be, made parties to it. The former are termed necessary, and the latter the proper, parties to the suit. The limitation of the jurisdiction of the federal courts by the citizenship of the parties, and the inability of those courts to bring in parties beyond their jurisdiction by publica-

tion, has resulted in a modification of this rule, and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the Court cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed.'

* * * *

" 'The general rule in equity is that all persons, materially interested, **either legally or beneficially,** in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72.

> " 'The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, sua sponte, though not raised by the pleadings or suggested by the counsel.' "

United States v. Ladley, 51 Fed. (2d) 756, is a decision by Judge Cavanah, before whom this suit was tried. It contains a very lucid discussion as to who are indispensable parties. On the facts it is very much like the case at bar, and the holding of Judge Cavanah then was, as we read the decision, directly contrary to the holding in this case. Suit was brought by the United States against Ladley to quiet title to property formerly the bed of Mission Lake, in Idaho. The claim of the United States was that at the time Idaho was admitted to the Union, the lake was non-navigable, and therefore belonged to the riparian lands of an Indian tribe. Ladley claimed that the lake was navigable when Idaho was admitted into the Union and that, having complied with the laws of the state, he had acquired title to part of the bed thereof. The State of Idaho moved for leave to intervene, claiming that it was the owner of the bed of the lake. The United States opposed intervention by the state upon the grounds that it was not an indispensable party, and that if interven-

tion were allowed the Court would be ousted of jurisdiction. The Court held that the state was an indispensable party, that it should be allowed to intervene, as a matter of absolute right, and that such intervention would not oust the Court of jurisdiction. The Court said, in part (p. 757):

> "Of course the rights of all persons interested in the subject-matter of the suit should be decided in the present litigation, and parties having an immediate interest in the subject ought to be made parties to the suit. The state is so situated in respect to this litigation that the court ought not to proceed in its absence, and, when brought in, the case would be between the United States on the one hand and the state on the other, with the defendant, one of the citizens of the state, contesting both the rights of the United States and the state. The interest of the state is of such a nature that a final decree could not be made in the action without affecting that interest, and it would be improper for a court of equity in the exercise of a fair discretion to proceed without it. State of California v. Southern Pacific Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683; New Mexico v. Lane, et al., 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588; Louisiana v. Garfield, 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92; Percy Summer Club v. Astle, et al. (C. C.), 110 F. 486."

The Court further held, with ample citation of authority to support it, that when a state intervened it waived its immunity from suit and the Court had jurisdiction to proceed and determine

the controversy between it and the United States. (See also Gregory v. Stetson, supra.)

**The decree should be reversed and the suit dismissed or the States of Oregon and Washington permitted to intervene and litigate their claims of title. The United States may sue either or both States in the Supreme Court of the United States and litigate title. Neither State can sue the United States without its consent, which has not been given; hence, if the decree stands, the asserted titles of the States will be perpetually clouded, because there is no Court to which they may go to have them litigated.**

United States v. Texas, 143 U. S. 621, 36 L. Ed. 285.

United States v. Oregon, 295 U. S. 1, 79 L. Ed. 1267.

Kansas v. United States, 204 U. S. 331, 341, 51 L. Ed. 510, 513.

Minnesota v. Hitchcock, 185 U. S. 373, 386, 46 L. Ed. 954, 962.

Oregon v. Hitchcock, 202 U. S. 60, 68, 50 L. Ed. 935, 938.

State, ex rel North Dakota, 257 U. S. 485, 489, 66 L. Ed. 329, 331.

United States v. Turner, 47 Fed. (2d) 86.

## ARGUMENT

The facts in this case make peculiarly persuasive and forceful the contention that the States of Oregon and Washington are indispensable parties, without whose presence no decree should have been passed.

Appellee adopted the procedure of bringing suit to litigate its title to the lands in controversy against appellants, who claimed no title, as appellee well knew when the suit was brought. The suit was brought in the District Court, a forum selected by appellee. It could have brought suit in the Supreme Court of the United States and made both states defendants. It successfully objected to the states being made parties, although they sought to intervene and submit themselves to the jurisdiction of the Court. The states were the only claimants to title adverse to appellee. The objection urged against the states being allowed to intervene was mainly based on the ground that if intervention were allowed the District Court would be ousted of jurisdiction. Thus by the device of bringing suit against parties who had, and claimed, no title to the premises in controversy, in a Court which appellee, in opposing the petitions for inter-

vention, successfully contended had no jurisdiction to adjudicate conflicting claims to the property between the United States and the states, appellee has secured a decree which for all practical purposes in a decree that neither state has any title. This decree, if permitted to stand, will be a perpetual cloud upon the title asserted by the states, for the reason that the states can have no judicial redress; there is no court to which they may go and sue the government and have their asserted titles litigated.

The learned trial court clearly understood that the real controversy was between appellee and the states. This is manifest from the language used in the oral opinion denying the petitions for intervention. He fell into the error of assuming that the Supreme Court of the United States had exclusive jurisdiction, that intervention by the states would oust the court of jurisdiction, and that the states might go into the Supreme Court, or some other court, which he did not identify, and litigate their claims to the property against appellee. The attention of this court is invited to some language used by the learned trial court in the oral opinions referred to (Tr., pp. 92, et seq.). In part, he said:

> "COURT: I appreciate, gentlemen, you have a question of jurisdiction between the United States and the states. We have a statute, as I recall it, which provides that an action be-

tween the government and the states involving title to property, the Supreme Court of the United States has original jurisdiction. * * * Under that statute, Congress has granted original jurisdiction in the Supreme Court of the United States in controversies over ownership of property between the government and the state. Now, with that statute in mind, if the court permits these petitions for intervention of the States of Oregon and Washington, I will be assuming original jurisdiction here, when it belongs in the Supreme Court of the United States, and I doubt whether any theory of this court would avail you anything at all. * * * That is the purpose of that statute granting original jurisdiction to the Supreme Court in controversies between the state and the government over the ownership of property. You can see what the result might be. Now the states are not necessary parties in this litigation, as I view it. This court can go on and determine the controversy between the government and these defendants. It is true it would not bind the State of Oregon or the State of Washington. It would only be binding on the parties before the court, and that would be the United States and these defendants. If the States of Washington and Oregon afterwards desired to litigate it would probably bring whatever suit it thought proper. And I am under the impression, gentlemen, that this question of jurisdiction is a very serious one, where you have to determine between the two states and the United States government the ownership of this property.

"* * * I am under the impression, gentlemen, that these petitions of intervention should not be allowed, but the case should proceed between the original parties, and you will

> have to determine hereafter the interests of these states in the proper forum."

The views thus expressed by the learned trial court are in direct conflict with the well considered opinion rendered by him in United States v. Ladley, 51 Fed. (2d) 756, referred to, supra.

The Court did not identify the statute to which he referred and upon which his holding seems to have been based, or the court to which the states might go to litigate their asserted titles. He may have referred to Section 233 of the Judicial Code (Section 341, Title 28, Chapter 9, U. S. C. A.), which, in part, reads:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of another state, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction."

This statute has existed without change since 1787, and has never been construed as authorizing a state to sue the United States, or as precluding a subordinate Federal Court from taking jurisdiction of a controversy affecting the rights of a state when the state has voluntarily submitted to its jurisdiction. The learned trial court in the case at bar evidently overlooked his decision in the Ladley case, supra, stated in the following lan-

guage, holding that the State of Idaho had a right to and should be permitted to intervene (p. 757):

> "By Section 41 of the statute, the original jurisdiction of the District Court among others, is: 'Of all suits of a civil nature, at common law or in equity, brought by the United States.' This section gives to District Courts concurrent jurisdiction over suits brought by the United States with the jurisdiction of the Supreme Court of the United States which is original. The United States under this section could maintain an action in the District Court against the state, as there are no exceptions. Referring then to Section 341 of the statute, so far as applicable here, we find that there is defined both the original and exclusive jurisdiction of the Supreme Court as it is there declared that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases, it shall have original, but not exclusive, jurisdiction.' While it is true that this clause declares 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party', yet the Supreme Court has held that it has no application to suits against the United States and bases its decision upon the conclusion that Congress had authorized the United States to be sued in the Court of Claims, and for the reason 'there could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The Act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all

> cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States, upon any demand in the Circuit Court or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a state is a party than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.' United States v. Louisiana, 123 U. S. 32, 36, 8 S. Ct. 17, 19, 31 L. Ed. 69. In the case we have here, Congress has authorized the United States to bring this suit under Section 41, title 28, U. S. C. A., and, when it did so, consent was given to any one, who may have an interest in the litigation of such a nature as to become a necessary party, to appear and have his rights determined."

We have stated that if appellee, at the time this suit was brought, was of the view that the asserted rights of the states, which were known, manifest and of long standing, could not be litigated in the district court even with their consent, it could have brought an original suit in the Supreme Court of the United States and made either or both states defendants and had the whole controversy litigated. This was done in United States v. Texas,

supra. There the United States claimed title to certain lands and the State of Texas made claim to the same lands. The United States brought an original suit in the Supreme Court to establish its asserted title and have it quieted as against the claims of the State of Texas. The controversy there was in every essential aspect like the controversy here. The jurisdiction of the Court to entertain and decide the controversy was sustained.

The same procedure was followed in United States v. Oregon, supra, which was a suit by the United States against the State of Oregon to quiet title to the beds of certain lakes in Harney County, Oregon, to which the state asserted title. The case was decided in April, 1935.

Neither the State of Oregon nor the State of Washington can sue the United States, either in the Supreme Court of the United States or in any other court, without its consent, and we find no statute by which the Congress have given consent that the United States may be sued in this type of case. It has been the uniform holding of the Supreme Court of the United States that the government is not subject to suit without its consent, that its consent can be expressed only by statute, and that the courts cannot go beyond the letter of such consent as expressed by statute. See Kansas v. United States; Minnesota v. Hitchcock; Oregon v.

Hitchcock; State ex rel North Dakota v. Railroad Commission; United States v. Turner, supra.

An interesting application of the rule, and the strictness with which it is applied, is exhibited in United States v. Turner, supra, a decision by the Circuit Court of Appeals of the 8th Circuit. Turner brought a suit against the United States in the United States District Court in North Dakota, to quiet title to certain lands. The United States, through its District Attorney, answered to the merits and went to trial, and a decree was entered in favor of Turner. Thereafter, the United States filed a motion to vacate the decree, which was overruled by the District Court. The Circuit Court of Appeals held that there was no statute by which consent of the United States was given to be sued, and that the decree was void.

There is, therefore, no court to which either state may go to litigate its asserted title to the premises in question. If the decree in this suit stands, the states are wholly without remedy. They can never litigate their asserted titles unless at some time in the future the Congress, by statute, permits them to bring suit.

**If intervention by the states would oust the Court of jurisdiction, which we deny, that would afford no ground or reason for proceeding in this suit to a decree in the absence of the states.**

California v. Southern Pacific Co., 157 U. .S 229, 39 L. Ed. 683.

New Mexico v. Lane, 243 U. S. 52, 58, 61 L. Ed. 588, 591.

C. M. & St. P. Co. v. Adams County, et al., 72 Fed. (2d) 816.

Himes v. Schmehl, 257 Fed. 69, 71.

United States v. Bean, 253 Fed. 1, 6.

Land Co. v. Elkins, 20 Fed. 545.

21 C. J. 276.

## ARGUMENT

It may be contended by appellee in this Court, as it was contended in the trial court, that intervention by the States of Oregon and Washingon would oust the court of jurisdiction. We will presently show that this contention, if made, finds no support in the decided cases. But, suppose we grant the contention for the sake of argument. That does not meet the situation presented by this record. In equity and good conscience, and with due regard for the known and asserted claims of the states, the trial court should not have passed

a decree which materially and injuriously affected their asserted rights. It is no answer to say that, if the states were made parties, and thus permitted to litigate their rights, the court could not have passed any decree because it would have been without jurisdiction. The absence of indispensable parties is not excused, the objection to the court proceeding without their presence in a suit is not obviated, because the court would have no jurisdiction to proceed if they were made parties.

The last paragraph of the syllabus to California v. Southern Pacific Co., supra, sums up the rule thus:

> "Where there are indispensable parties that are not made parties to a suit in equity in this court, and the making them parties would oust its jurisdiction, the suit will be dismissed for want of such parties who should be joined but cannot be without ousting the jurisdiction."

In New Mexico v. Lane, et al., supra, the court pointed out that Keepers, who claimed an interest in the land in controversy, was not a party, that he was a citizen of New Mexico, that to make him a party would oust the court of jurisdiction, and cited and applied the rule in California v. Southern Pacific Co., supra.

In Chicago, M. & St. P. Co. v. Adams County, et al., supra, this Court quoted with approval the following extract from Story:

> "The established practice of courts of equity to dismiss the plaintiff's bill, if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter, who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, sua sponte, though not raised by the pleadings or suggested by counsel,"

and in support of this rule the Court cites Gregory v. Stetson, California v. Southern Pacific Co., supra, and other cases.

In Himes v. Schmehl, supra, the Court said:

> "The bill does not allege any reason for the non-joinder of Seymour, but plaintiff seeks to excuse his non-joinder, in that his joinder would oust the jurisdiction of the court as to the parties before the court. That consequence cannot make it regular to proceed without him. It only proves that the court below was not the proper tribunal to settle the controversy. If it be once settled that the suit may not be maintained, save by the joinder of Seymour as a party, Himes cannot set up the limited jurisdiction of the court for not so joining him. Parsons et al. v. Howard, Fed. Cas. No. 10,777. Nor can this result be affected by equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix). California v. Southern Pacific Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683."

And in United States v. Bean, supra, the Court said:

> " 'The established practice of courts of equity to dismiss the plaintiff's bill,' says the Supreme

Court in Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 322 (46 L. Ed. 499), 'if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel. Shields v. Barrow, 17 How. 130 (15 L. Ed. 158); Hipp v. Babin, 19 How. 271, 278 (15 L. Ed. 633); Parker v. Winniposeogee Lake Cotton & Woolen Co., 2 Black 545 (17 L. Ed. 333).' To the same effect is the opinion of this court in Hawes v. First Nat. Bank, 229 Fed. 51, 57, 59, 143 C. C. A. 645, 651, 653.

"It is a familiar and just rule that no court may directly adjudicate a person's claim of right, unless he is actually or constructively before it. It is an established rule of practice in the conduct of suits in equity in the federal courts that every indispensable party must be brought into the court or the suit must be dismissed. And an indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

In 21 C. J. 276, the rule is thus stated:

"Where a necessary and indispensable party as here defined is out of the jurisdiction of the court, or for some other reason cannot be brought before the court, the court cannot proceed, but must dismiss the bill, and plaintiff

is remediless, for the suit is unavoidably defective. The burden is on the plaintiff to bring in all parties necessary to the granting of the relief sought, and it is his misfortune if he is unable to do so. The rule of exception permitting the omission, in certain cases, of parties who cannot be brought in, does not apply to indispensable parties."

**Intervention by the States of Oregon and Washington would not have ousted the trial court of jurisdiction.**

Clark v. Barnard, 108 U. S. 436, 27 L. Ed. 780, 784.

Brewer-Elliott, etc., Co. v. U. S., 260 U. S. 77, 67 L. Ed. 140.

Porto Rico v. Ramos, 232 U. S. 627, 631, 58 L. Ed. 763, 765.

Gunter v. Atlantic Coast Line Co., 200 U. S. 273, 284, 50 L. Ed. 484.

St. Louis v. Yates, 23 Fed. (2d) 283, 284.

Missouri v. Fiske, 290 U. S. 18, 24, 78 L. Ed. 145, 151.

U. S. v. Ladley, 51 Fed. (2d) 756-759.

## ARGUMENT

The learned trial court, as we have seen, denied the petitions of the States of Oregon and Washington to intervene, mainly, if not wholly, on the ground that the Supreme Court of the United States was vested with exclusive jurisdiction to try controversies between the United States and the states affecting ownership of property, and that if interventions by the states were permitted the jurisdiction of the court would be ousted. The trial court reached exactly the opposite conclusion in the Ladley case, supra.

In Clark v. Barnard, supra, it was insisted that the suit, although in form against the General Treasurer of the State of Rhode Island, was in legal effect a suit against the state and that the court had no jurisdiction. The state voluntarily appeared as an intervening claimant to the fund in controversy. The Supreme Court thus disposed of the contention that the trial court was without jurisdiction:

> "We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure;

> so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title."

Brewer-Elliott, etc., Co. v. United States, supra, was a suit brought by the United States in behalf of itself and as trustee for the Osage tribe of Indians, against the Brewer-Elliott Company and others, lessees, under oil and gas leases executed to them, or to their assignors, by the State of Oklahoma. The bill alleged that the property thus leased belonged to the Osage tribe and prayed for a decree quieting title to the property in the United States as trustee and enjoining the defendants from going upon the premises. The case is very much like the one at bar. The State of Oklahoma petitioned for leave to intervene, and intervention was allowed. The contest from then on was between

the United States upon the one hand and Oklahoma on the other. The case went to final decree in favor of the government, and on reaching the Supreme Court the decree was affirmed. While the question of jurisdiction was not raised, it is not to be supposed that the trial court, Circuit Court of Appeals and the Supreme Court, would have failed to notice their own lack of jurisdiction, by reason of the intervention of the State of Oklahoma, if jurisdiction were lacking. Indeed, the learned trial judge who sat in this case, in his decision in the Ladley case, in which intervention by the State of Idaho was allowed, referred to the Oklahoma case as a precedent in this very apt language (p. 759):

> "The proceeding here is identical with the proceeding adopted in the case of Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140, where the United States brought suit as trustee for the Osage tribe of Indians against certain oil companies to cancel oil and gas leases granted by the State of Oklahoma covering lands constituting part of the bed of the Arkansas river within the Osage reservation. The State of Oklahoma intervened by leave of court and denied that the United States, as trustee, or the Osage tribe, owned the river bed of which the lots were a part, and averred that they were owned by the state in fee. It can hardly be said that in that case the court or counsel overlooked the preliminary question of jurisdiction where the United States and the state were parties, for it is said in the case of

> Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 654, 46 L. Ed. 954, that: 'It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercised no powers save those conferred by law.'"

Porto Rico v. Ramos, supra, was a suit brought in the District Court of the United States for Porto Rico. It involved title to land. Porto Rico asserted rights in the property and petitioned for, and was granted, leave to intervene and be made a defendant. Thereafter, Porto Rico asserted that the Court had no jurisdiction to litigate its rights because of its sovereign capacity. The court held that when Porto Rico, on its petition for leave to intervene, was made a party, it waived its immunity and consented to the jurisdiction of the court and was bound by the decree entered. The holding is epitomized in the first paragraph of the syllabus in this language:

> "Porto Rico cannot invoke its immunity from suit without its consent to defeat jurisdiction of an action in which, through its Attorney General, it voluntarily petitioned, after due deliberation, to be made a party defendant, asserting rights to the property in dispute, and in which it was made such party against the plaintiff's opposition."

In Gunter v. Atlantic Coast Line Co., supra (p. 585), the Court said:

> "Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the results of its own voluntary act by invoking the prohibitions of the 11th amendment."

And in the recent case of Missouri v. Fiske, supra (p. 28), the Court said:

> "The fact that a suit in a Federal Court is in rem, or quasi in rem, furnishes no ground for the issue of process against a non-consenting state. If the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event, its rights will receive the same consideration as those of other parties in interest."

In St. Louis, etc., Co. v. Yates, supra (p. 284), a decision by the Circuit Court of Appeals of the 8th Circuit, it appeared that suit had been brought against Yates as tax collector of an Arkansas county, that the State of Arkansas and another filed petitions for leave to intervene, and leave was granted. Thereafter, the suit went to decree on the merits against complainant. It was urged by complainant on appeal that the court erred in permitting the State of Arkansas and the City of Texarkana to intervene, that the state should not have been made a party, and that when the state

was made a party the court lost jurisdiction. Rejecting this contention, the Court said:

> "Article 5, Section 20, of that Constitution (of Arkansas) provides that, 'the State of Arkansas shall never be made defendant in any of her courts.' We are not cited to any Arkansas Supreme Court decisions construing this section. We think it should be construed to mean that the state cannot be compelled to defend in any action in a court of that state, but that the state may voluntarily appear and ask to be made a party in any action, either in the State or Federal courts."

Finally, it should be observed that after the Court had denied the petition of each state for leave to intervene, application was made in behalf of each state for leave to produce and examine witnesses and to submit argument. This also was denied (Tr., p. 96). Appellants were lessees of the State of Washington. They claimed no title.

Here we have a case of the State of Washington, who asserted title to the premises in controversy, and who was the lessor of appellants, denied the right to intervene and denied the right to in any way participate in or be heard in the suit.

**The trial court did not exercise its discretion, if it had any in this case, in denying the petition for leave to intervene.**

Hernan v. American Bridge Co., 167 Fed. 930, 934.

Felton v. Spiro, 78 Fed. 576.

Mattox v. U. S., 146 U. S. 140, 36 L. Ed. 917.

4 C. J. 798.

## ARGUMENT

If it be contended that the granting or refusing of a petition for leave to intervene rests in the discretion of the trial court, the answer is that the trial court did not exercise its discretion. Its oral opinion denying the petitions for leave to intervene (Tr., pp. 92, et seq) shows that the petitions were denied because the Court was of the view that it had no jurisdiction to grant such petitions, that exclusive jurisdiction in controversies concerning title to real estate, between the United States upon the one hand and a state on the other, was vested in the Supreme Court, and that to allow intervention would oust the Court of jurisdiction. It is clear the Court declined to exercise its discretion because it was of the view that it had no legal discretion in the matter. In this situation, the order of the trial court declining to permit

intervention will not be sustained as the exercise of discretion.

In Hernan v. American Bridge Co., supra, a decision by the Circuit Court of Appeals of the Sixth Circuit, it appeared that the trial court refused an application to amend a pleading upon the ground that it had no authority so to do. The Appellate Court held that the trial court had authority to allow the amendment, should have done so, and reversed the judgment. We quote from the opinion:

> "The granting leave to amend is ordinarily a matter addressed to the discretion of the Court, and its determination is for that reason not reviewable. This we have many times held. But where it appears that the Court's discretion was not exercised because of a supposed lack of authority, it is shown that the party has been denied his legal right to require the Court to entertain the question on its merits; and in such case the foundation for a writ of error is laid. Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917."

Felton v. Spiro, supra, is a decision by the Circuit Court of Appeals of the Sixth Circuit, written by Judge Taft. There had been a verdict and judgment in the lower court and a motion for new trial was made, which was denied. The Appellate Court was of the opinion that the trial court had denied the motion for a new trial for supposed

lack of authority to set aside a verdict for insufficiency of the evidence. It was held that the trial court had such authority, that it had not exercised its discretion in determining whether the motion should be allowed and reversed the case with instructions to pass on the motion insofar as it was based on insufficiency of the evidence to support the verdict. The Court said, in part:

> "If now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error."

And, in support of its decision, the Court cited the Mattox case, supra.

In 4 C. J. 798, it is said:

> "Where the trial court refuses to exercise a discretion vested in it on the supposed ground of want of power, judgment will ordinarily be reversed to the end that the discretion shall be exercised."

**The right to intervene in this case on the part of the States of Oregon and Washington was absolute and did not rest in the discretion of the trial court.**

Richfield Oil Co. v. Western Machinery Co., 279 Fed. 852, 855.

Central Trust Co. v. Chicago, etc., Co., 218 Fed. 336, 339.

Palmer v. Bankers Trust Co., 12 Fed. (2d) 747, 752.

Gaines v. Clark, 275 Fed. 1017, 1019.

California Cooperative Canneries v. U. S., 299 Fed. 908, 913.

## ARGUMENT

When it is considered that neither the State of Washington nor the State of Oregon can sue the United States in any court, and therefore cannot litigate their claims of title against the United States, what was said by this Court in Richfield Oil Co. v. Western Machinery Co., supra, is very apt and pertinent. This Court, in that case, said:

> "Of course, the general rule is that an application to intervene is addressed to the sound discretion of the court. Credits Com. Co. v. United States, 177 U. S. 316, 20 Sup. Ct. 636, 44 L. Ed. 782. But that rule is founded upon

> the assumption that the petitioner for intervention has other and adequate means of redress available to him, and therefore it is not unjust to him to rule that the main controversy should be proceeded with, freed of the complication injected by his assertions. * * * But, on the other hand, if one presents a situation where he will lose a meritorious claim unless he can obtain relief by coming into the main suit, to say that he may not intervene, is to deprive him of the only way by which he can have an opportunity to be heard. This would be equivalent to holding that, notwithstanding the fact that one has a direct interest in the litigation and the subject-matter thereof, and who shows that he is remediless unless he can assert his claim, has no absolute right to be heard, and must abide the discretion of the court, which may be exercised adversely to him, and so deprive him of any relief whatsoever."

In Palmer v. Bankers Trust Co., supra, the court used this language, peculiarly applicable here:

> "In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the petitioner, not being already fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. In such cases the right of intervention is often termed absolute." (Citing cases).

In Gaines v. Clark, supra, the Court said:

> "Wide discretion is vested in the chancellor in permitting or refusing leave to intervene in

a proceeding in equity. But this discretion is not absolute. If the party seeking intervention will not be left without a remedy in the suit in which leave to intervene is sought, the granting or refusal will usually be deemed discretionary with the court. But, if the party seeking intervention shows ownership in or a lien against the res which is the subject of litigation, and he is without remedy elsewhere to protect his right, the court should not refuse leave to intervene."

And in California Cooperative Canneries v. U. S., supra, the Court said:

"* * * The discretion of the chancellor in permitting or refusing intervention is by no means absolute. If the party seeking intervention shows such an interest in the litigation as to involve the protection of valuable rights and is without remedy elsewhere, the court should not refuse leave to intervene."

**The evidence wholly fails to sustain the findings and decree that appellee is the owner of the lands in dispute, or that they are accretions to Sand Island.**

## POINTS AND AUTHORITIES

(a) Upon their admission to the Union, Oregon and Washington, each, became vested with title

to the beds and banks to high water mark of all navigable waters within her boundaries.

Bowlby v. Shively, 22 Or. 410.

Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.

Hume v. Rogue River Packing Co., 51 Or. 237, 85 Pac. 391.

Pacific Elevator Co. v. Portland, 65 Or. 349, 133 Pac. 72.

Brace, etc., Mill Co. v. State, 49 Wash. 326, 95 Pac. 278.

Newell v. Abey, 77 Wash. 182, 137 Pac. 811.

(b) Title to the beds and banks of the navigable waters carries with it title to all tide lands, tide flats and like formations, and these the state owns, subject, of course, to the public right of navigation, and may sell, lease or otherwise dispose of.

See cases cited, supra, under Point (a), and

Taylor Sands Fishing Co. v. Benson, 56 Or. 157, 108 Pac. 126.

Van Dusen Investment Co. v. Western Fishing Co., 63 Or. 7, 124 Pac. 677, 126 Pac. 604.

(c) Tide lands and tide flats are lands above low water covered and uncovered by the flux and reflux of the tide.

Hardy v. California Trojan Powder Co., 109 Or. 76, 81, 219 Pac. 197.

Pac. Elevator Co. v. Portland, supra.

Taylor Sands Fishing Co. v. Benson, supra.

Van Dusen Investment Co. v. Western Fishing Co., supra.

(d) Accretions to tide lands above low water are governed by the same rule as accretions to the land of any other littoral proprietor.

Van Dusen Investment Co. v. Western Fishing Co., supra.

Taylor Sands Fishing Co. v. Benson, supra.

Fellman v. Tidewater Mill Co., 78 Or. 1, 152 Pac. 268.

(e) Title to tide flats, sand bars, tide lands, etc., follows them, if through the processes of attrition and accretion they move to new locations, and if in their mutations they preserve a substantial identity.

Taylor Sands Fishing Co. v. Benson, supra.

Van Dusen Investment Co. v. Western Fishing Co., supra.

Fellman v. Tidewater Mill Co., supra.

(f) Accretion is a gradual, imperceptible addition to the land of a littoral proprietor by the action of water; it is a slow, insensible abstraction of

particles from one place and depositing them in another. If a change is sudden, rapid, visible, as the result of storms, freshets, or other known or obvious cause, there is no change in ownership, property line or boundary.

Nebraska v. Iowa, 143 U. S. 349, 36 L. Ed. 186.

Washington v. Oregon, 211 U. S. 135, 136, 53 L. Ed. 118.

S. C., 214 U. S. 205, 215, 53 L. Ed. 965.

Taylor Sands Fishing Co. v. Benson, supra.

Sundial Ranch Co. v. May Land Co., 61 Or. 205, 216, 119 Pac. 758.

Spinning v. Pugh, 65 Wash. 470, 118 Pac. 635.

Harper v. Holston, 119 Wash. 436, 205 Pac. 1062.

Katz v. Patterson, 135 Or. 449, 452, 296 Pac. 54.

Holman v. Hodges, 112 Iowa 714, 84 N. W. 950, 58 L. R. A. 673.

Bouchard v. Abrahamsen, 160 Cal. 792, 118 Pac. 233.

Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N.S.) 162.

People v. Warner, 116 Mich. 228, 239, 74 N. W. 705.

45 C. J. 527, 528, 563, 564.

## ARGUMENT

The foregoing points are in truth, but subdivisions of one general proposition, and will be discussed together. We will first discuss them and then proceed to a consideration of the evidence.

The claim of the appellee, simply stated, is that a large body of land, all above low water all the time, which by accretions to it built towards and made contact with Sand Island immediately became an accretion to Sand Island when the contact was made. One would suppose this claim must be based on the theory that tide lands or tide flats are not the subject of ownership, that accretions to them are not within the general rule applicable to accretions to upland, and that when any tide lands or tide flats, through accretions to them, join with another body of land which may be partly above high water, they become an accretion to the latter. This theory has interesting implications. We suppose that, if the channel which now cuts across Peacock Spit northeasterly to southwesterly and which has existed as a charted channel for a couple of years, was to shoal up, appellee would claim all of the Peacock Spit up to the main land of Cape Disappointment as an accretion, just as it now claims that part of Peacock Spit which lies south and east of this new formed channel. And as the

Baker Bay area shoals up, as it is doing rapidly, appellee may claim, according to the same theory, that whole area, north, northwest, northeast to the Washington shore line as an accretion to Sand Island and all this may be claimed as an increment —unearned to be sure—to the grant of a small tide flat by the State of Oregon in 1864, situated several miles from the present location of Sand Island.

The original grant by Oregon to the United States, so far as here material, reads:

> "All right or interest of the State of Oregon * * * to Sand Island, situate at the mouth of the Columbia in this state; the said Island being subject to overflow between high and low tide."

At the time of the grant, Sand Island was a small tide flat located a considerable distance southeast of its present location. The maps of 1852 and 1870 (Govt.'s Ex. 1) will give a pretty good idea of the location and size of the Island in 1852 and the changes in its location and outline between then and 1870. The ater maps will show the progressive movement of the Island towards the northwest up until about 1914 or 1915, and during this time, it increased in size, changed its outlines and built up so that a considerable part is always above ordinary high water.

In Washington v. Oregon, 211 U. S. 127, 132, the Court, speaking of Sand Island, said:

> "It is called an island, but it was little more than a sand bar. By the action of the waters it had been gradually moving northward, but the general configuration of the mouth of the river was unchanged. Since then the movement of Sand Island has continued, the north channel has been growing more shallow, and the southern channel has become the one most used."

This movement of Sand Island is shown on a chart, made a part of the opinion of the Supreme Court.

In United States as Trustee, etc., v. McGowan, and same v. Baker's Bay Fish Co., 62 Fed. (2d) 955, 956, this Court said:

> "Sand Island, shown on the map of 1854, has gradually moved by the process of accretion and attrition, until it is now less than half a mile directly east of Sand Island (Cape Disappointment?) and has grown in size from less than one-half mile to more than two miles in length. Peacock Spit is bare at high tide. It is a relatively recent growth, although shoal water extending southwesterly (not southeasterly as at present) from Cape Disappointment had been long known as Peacock Spit by reason of the wreck of a ship of that name in that location. Such a shoal is first shown on the Coast Survey Map of 1851. As early as 1885, there was a small island dry at low tide, immediately south of the present location of Peacock Spit, and extended to a very small extent into the area now occupied by Peacock Spit. This island had completely disappeared before Peacock Spit emerged from the water in that location. Sand Island, by 1885, had

> moved to approximately its present position, being about half a mile further east than its present location. Under these circumstances it is, of course, not contended that the Quinaielt Indians ever fished from Peacock Spit as a usual and accustomed fishing place. Since it was formed it has been leased by the State of Washington to the appellee, Baker's Bay Fish Company at an annual rental of $36,000; the lease having been secured by that company in pursuance of its bid at public auction. * * *"

Appellee owns Sand Island today, increased in size and at its new location, because of a rule of property in Oregon that accretions to tide flats are governed by the same law as accretions to upland, and because of another rule of property that title to tide flats follow them to a new location, if in their mutations they observe a substantial identity.

Oregon, upon her admission to the Union, became vested with title to the bed and banks to high water mark of all navigable waters within the state. This included all tide lands, tide flats, sand islands and other like formations in these navigable waters. This was the rule of property declared by the Supreme Court of Oregon in Bowlby v. Shively, 22 Or. 410, and affirmed by the Supreme Court of the United States in Shively v. Bowlby, 152 U. S. 1, 59, 38 L. Ed. 331. The rule of property in the State of Washington is the same.

See decisions of the Supreme Court of that state cited under Point (a), supra.

In Shively v. Bowlby, supra, the Supreme Court of the United States said (p. 57):

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people.
>
> "At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States.
>
> * * * *
>
> "The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

In Hume v. Rogue River Packing Co., 51 Or. 237, 246, the Court said:

> "By virtue of its sovereignty, the state, upon its admission into the Union, became vested with the title to all the shores of the sea and arms of the sea covered and uncovered by the ebb and flow of the tide, usually called tide lands (Hinman v. Warren, 6 Or. 418; Bowlby v. Shively, 22 Or. 410; 30 Pac. 154), as well as of the land under all of the navigable waters within the state; subject, however, to the public right of navigation and to the common right of the citizens of the state to fish therein; Martin v. Waddell, 41 U. S. (16 Pet.) 367 (10 L. Ed. 997); Shively v. Bowlby, 152 U. S. (45 Davis) 1 (14 Sup. Ct. 548; 38 L. Ed. 331); Knight v. United States Land Assoc. 142 U. S. 161 (12 Sup. Ct. 258; 35 L. Ed. 974).
>
> * * * *
>
> "By the law of this state, as declared and established by this court, the owner of upland bordering on navigable water has no title in the adjoining lands below high water mark, nor any rights in or over the adjoining waters as appurtenant thereto: Hinman v. Warren, 6 Or. 418; Parker v. Taylor, 7 Or. 435; Parker v. Rogers, 8 Or. 183; Shively v. Parker, 9 Or. 500; McCann v. Oregon Ry. Co., 13 Or. 455 (11 Pac. 236); Bowlby v. Shivley, 22 Or. 410 (30 Pac. 154)."

It follows, of course, that the title to the bed and banks of navigable waters carries with it all tide lands, tide flats and like formations which the state may sell, lease or otherwise dispose of. See cases cited under Point (b), supra.

At an early day the Oregon Legislative Assembly made provision for the sale of tide lands. It was later held (Elliott v. Stewart, 15 Or. 259, 14 Pac. 416), that this legislation did not authorize the sale of tide lands not connected with the shore. In the meantime, however, conveyances had been made by the State Land Board to sundry persons of tide lands in the Columbia River not connected with the shore. In 1891 (Ore. Laws, 1891, p. 189), the State Land Board was authorized

> "to sell the remaining unsold tide and swamp lands, including tide flats not adjacent to the shore and situate within the tide waters of the Columbia River and Coos Bay."

The Act also confirmed title to all tide flats in the Columbia River and Coos Bay theretofore conveyed by the state. In 1907, the Legislative Assembly (Ore. Laws, 1907, p. 206, Chap. 117) provided for the classification, control, leasing, sale and other disposition of land owned by the state. Among the categories were

> "All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide and all islands, shore lands, and other such lands held by the state by virtue of her sovereignty."

The same classification was carried into existing statutes; Section 60-301, subdivision (f); Oregon Code, 1930.

Authority to sell tide lands and tide flats not connected with the shore was suspended for ten years in 1907 (Ore. Laws, 1917, Chap. 202 p. 312). In 1917 this law was again amended to suspend the right to sell until 1937 (Ore. Laws, 1927, Chap. 177, p. 200). The authority to lease was not restricted.

All tide and overflow lands belonging to the state may be leased to the highest bidder in Oregon (Sec. 60-312, Oregon Code, 1930).

It is provided by statute in Washington that:

> "Public lands of the State of Washington are lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law, and include state lands, tide lands, shore lands, and harbor areas as hereinafter defined, and the beds of navigable waters belonging to the state." (Rem. Comp. Statutes, 1927, Supp. Sec. 7797-1).

Provision is made for leasing tide and shore lands and other lands (Rem. Comp. Statutes, 1927, Supp., Secs. 7797-22, 7797-59, 7797-73).

Tide lands and tide flats are lands above low water covered and uncovered by the flux and reflux of the tide. In Hardy v. California Trojan Powder Co., 109 Or. 76, 81, 219 Pac. 197, it was said:

> " 'Tide land' is a descriptive phrase, applied to lands covered and uncovered by the ordinary

tides, and has been frequently defined by this court." (Citing many cases.)

See also cases cited under Point (c), supra.

Accretions to tide lands and tide flats above low water are governed by the same rule as accretions to the land of any other littoral propretor.

Taylor Sands Fishing Co. v. Benson, 56 Or. 157, 108 Pac. 126, was a suit to enjoin the State Land Board from leasing certain tide lands in the Columbia River. Plaintiff acquired title to said tide lands through mesne conveyances by the State of Oregon, upon which it was landing drag seines. There had been accretions to the lands purchased by it which the State Land Board was proposing to lease to another and it prayed for an injunction. The Court pointed out that under legislation existing at the time of the conveyance by the state, it was authorized to grant a fee simple title to tide lands. At the time of the original conveyance by the state, and at the time the suit was filed, the land conveyed was below high water, but was covered and uncovered by the flux and reflux of the tide. The Court said:

> "The title being thus vested, the remaining questions to be considered are whether or not the area of the premises can be augmented by accretions, and, if so, can the defendants, who are officers of the state, be enjoined from leasing such gradual accumulations of the soil."

The Court answered both questions in the affirmative, in part, saying:

> "The defendants' counsel, invoking an allegation of the complaint that the tide lands therein described are covered by water to a depth of four to six feet for a large part of each day, insist that the premises are not part of an island, but are a shoal, and, such being the case, the land so designated by metes and bounds, cannot be enlarged by accretions. This averment should be construed in connection with another allegation of the plaintiff's pleading, to the effect that it is the owner of all the tide lands so mentioned which are 'lying between ordinary high and low tide line in the Columbia River'. The common high water mark, occurring in places where the alternate rising and falling of the ocean and of bays and rivers affected by it twice in each lunar day, means a line on the shore which is reached by the limit of the flux of the usual tide. Interpreting in pari materia such clauses, it is reasonably to be inferred therefrom that the tide lands mentioned are a part of an island.
>
> "If, however, it should subsequently appear from testimony to be given that such lands constitute a sand bar which is wholly covered by water at each high tide, we do not think the overflow of the premises would render them incapable of enlargement by accretions; for, as was said by Mr. Justice Burch, in Fowler v. Wood, 73 Kan. 511, 549, 85 Pac. 763, 776 (6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534): 'It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged

are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. * * * Before it will support vegetation of any kind, a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon the borders would make it more valuable, no reason is apparent why the law of accretion should not apply.' * * * If it were conceded that imperceptible accumulations of soil by natural causes were not a part of such tide lands, it would necessarily follow that each addition thereto of earthy matter would belong to Oregon, and, notwithstanding a prior lease of the alluvion, for the purpose of fishing, had been consummated and the term unexpired, the state could let the accretions which always border the stream, thereby rendering valueless the prior disposal, and making a lease for a specific term a tenancy at the will of the lessor. As the consequences supposed would be so disastrous to all tenants but the last, we think reason supports the assertion that the plaintiff is entitled to the accretions, if any have been made, to its tide lands. Hume v. Rogue River Packing Co., 51 Or. 237, 243, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865."

See also cases cited under Point (d), supra.

Title to tide lands, tide flats, sand bars, etc., in the navigable waters of Oregon follows them, if through the processes of attrition and accretion,

they move to new locations and in their mutations preserve a substantial identity.

In Van Dusen Investment Co. v. Western Fishing Co., 63 Or. 7, 18, 124 Pac. 677, the Court said:

> "The owners of tract No. 1 are entitled to the accretion that lodged on and thus formed a part of such tide flats. Taylor Sands Fishing Co. v. State Land Board, 56 Or. 157 (108 Pac. 126). The tideland island as originally granted, has gradually moved westward, and no part of it is now exposed at low tide within the description given in the confirmatory deed. The title of Hobson and Van Dusen and of their successors in interest extended to all accretions made to such land, and, though the surface of the original island may have been washed away, the possession of the whole tract of such imperceptible deposits of earth, sand, and gravel, follows the paper title."

See also cases cited under Point (e), supra.

"Accretion" is a term describing a gradual, imperceptible addition to land by the action of waters. It is a slow, insensible abstraction of particles from one place and depositing them in another. If the change is perceptible, rapid, visible, as the result of storms, freshets or other known or obvious cause, there is no change in ownership, property lines or boundaries.

Title to islands formed on the bed of navigable waters and tide lands, tide flats and like formations, follows title to the bed. If any such forma-

tion extends its boundaries by accretions until it reaches the shore, or the land of another owner, it will not become the property of the latter. If not granted away, it remains the property of the state and the boundary line between the two bodies of land will be where they meet. This is so even though the process of building up of the one tract, or the other, or both, finally closes a channel which may have existed between the two bodies of land.

A sudden, perceptible change in the course of navigable waters by which all or a part of the current of the stream seeks a new bed or channel, works no change of boundary, the boundary remains as it was, in the center of the old channel, although it may be entirely closed.

In Nebraska v. Iowa, 143 U. S. 359, 365, 36 L. Ed. 186, the Court quoted with approval the following from Vattel (p. 365):

> " 'If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural and indeterminate bounds (territoria arcifinia), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side—or if it is given to me upon

that footing, I thus acquired beforehand the right of alluvion; and consequently I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly' because, in the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. * * *

" 'But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring states, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river (§ 267), and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the state in which it flows.' "

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit, the center of the abandoned channel. * * *"

In Washington v. Oregon (211 U. S. 127, 53 L. Ed. 118, 214 U. S. 205, 53 L. Ed. 969), the Court applied the rule declared in Nebraska v. Iowa, and held that the boundary line between the two states, as fixed by Act of Congress, was the middle of the north ship channel which after passing Cape Dis-

appointment, swung northerly and easterly into the Baker Bay area, and, said the Court (p. 135):

> "That remains the boundary, although some other channel may, in the course of time, become so far superior as to be practically the only channel for vessels going in and out of the river. It is true the middle of the north ship channel may vary through the processes of accretion * * *."

and page 136:

> "Concede that today, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size, yet, when did the condition of the two channels change so far as to justify transferring the boundary to the south channel? When and upon what conditions could it be said that grants of land or of fishery rights made by the one state ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand Island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?
>
> "These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states

> bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river.
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> * * * *
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> "Our conclusion, therefore, is in favor of the State of Oregon, and that the boundary between the two states is the center of the north channel, changed only as it may be from time to time through the processes of accretion."

We have seen that the claim of Washington is that the channel between Peacock Spit and Sand Island was the North Ship Channel; and that as the growth of and accretions to Peacock Spit pushed the channel southerly and easterly closer to Sand Island, the middle of that channel continued to be the boundary line; that when, in the heavy storms of 1929, a new channel was cut across Peacock Spit about where the sailing vessel "North Bend" was driven through, this new channel, which in 1933 became the chartered ship channel, was not the result of the gradual, imperceptible processes of accretion, but, rather, the result of avulsion, and did not become the boundary line.

That part of Peacock Spit, the premises in controversy, thus separated from the part which remained attached to Cape Disappointment, retained its form and identity.

We have also seen that the claim of Oregon is that, when accretions to these sands constituting the lower part of what was Peacock Spit, substantially closed the channel between them and Sand Island, the new channel cut across Peacock Spit became the boundary line. We are not here discussing which contention is correct.

In Sundial Ranch v. May Land Co., 61 Or. 205, 216, the Court quoted with approval this statement of the law of accretions (p. 216):

> "'Accretion is the imperceptible accumulation of land by natural causes, and the owner of the property to which the addition is made becomes the owner of such ground, as where land is bounded by a stream of water which changes its course gradually by alluvial formation, the owner of the land still holds the same boundary, including the accumulated soil'—citing Inhabitants of New Orleans v. U. S., 10 Pet. 662, 717 (9 L. Ed. 573)."

In Harper v. Holston, 119 Wash. 436, 205 Pac. 1062, the Court said (p. 1064):

> "Another rule is that, when grants of land border on running water, and the course of the stream is changed by that process known as accretion—that is to say, the gradual washing away on the one side and the gradual building up on the other—the owner's boundary changes with the changing course of the stream. As was said by the Supreme Court of the United States in New Orleans v. United States, 10 Pet. 662, 9 L. Ed. 573:

"'No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gains.'

"The rule is as much applicable to the government as it is to private individuals. If the government chooses to grant its lands making a running stream one of the boundaries of the grant, it must expect this part of the boundary to change as time goes no. Ordinarily, it gains in one place what it loses in another, and on no principle of justice can it say that it is not to be subjected to the general rule. And such we understand to be the holding of the Supreme Court in Jefferis v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872.

* * * *

"On the other hand, it is equally the rule that when a stream, which is a boundary, from any cause suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable body of land and deposits it on the opposite bank, the boundary does not change with changed course of the stream, but remains as it was before. This sudden and rapid change is termed in law an avulsion, and differs from an accretion in that the one is violent and visible, while the other is gradual, and perceptible only after a lapse of time."

As has already been observed, the rule with respect to accretions to the bed of navigable waters, sand spits, tide flats, islands, etc., is the same as

that applicable to accretions to the main land.

In 45 C. J. 527, 528, it is said:

> "To entitle the riparian owner to the alluvion the accretion must begin from his land and not from some other point so as finally to reach his land. Hence, where his ownership is only to the bank or shore, the accretion must begin at such point. * * *
>
> "Where an island springs up in the midst of a stream, it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner, although it afterward becomes united with the mainland.
>
> * * * *
>
> "The owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the shore of the mainland. If the accretion commences with the shore of the island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but if accretions to the island and to the mainland eventually meet, the owner of each owns the accretion to the line of contact."

And in 45 C. J. 563, 564:

> "The ownership of an island generally follows the ownership of the bed of the water, so that if the state or crown owns the land under water, it also owns the island, while if the riparian owner has title to the bed, the island belongs to him up to the line of his ownership of the bed, and if the riparian owner is not the owner of the bed of the stream, he is not the owner of the island, unless it has been granted to him."

In State v. Imlah, 135 Or. 66, 70, 294 Pac. 1046, the Court said:

> "The state's principal contention is that the small island first appearing in 1882, or shortly thereafter, somewhere west of the center of the river continued to exist as an island and to become enlarged by the gradual and imperceptible deposit of sand and gravel upon its outer edges, thereby filling up the channel between it and the west bank and extending the island to the mainland, and that the alluvion thus deposited between the two constituted an accretion to the island and not to the mainland as contended for by the defendants, and as held by the court below in the decree appealed from. If this contention is sustained by the evidence, the rule unquestionably is that where an island arises in a stream, the title to the bed of which is in the state, it does not belong to the owner of either shore. But if it is formed upon a portion of the bed which belongs to a riparian owner, it becomes his property."

Again, in Katz v. Patterson, 135 Or. 449, 452, 296 Pac. 54, where it was claimed by a grantee of tide lands from the state that another close-by sand formation became an accretion to the grant, the Court said:

> "We have seen that this controversy arises upon plaintiff's claim that the land involved is an accretion to the tide island purchased by plaintiff Katz from the state in 1907, while the state contends that the property is a separate island formed on the bed of the Columbia river and hence is the property of the

state. If the land is an accretion to the bed of the Columbia river, the title rests in the state."

See also:

Taylor Sands Fishing Co. v. Benson, 56 Or. 157, 108 Pac. 126.

Fellman v. Tidewater Mill Co., 78 Or. 1; 152 Pac. 268.

Holman v. Hodges, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, is an interesting and well considered case, and quite in point. Plaintiff owned land bordering on the Mississippi river. Some years after he acquired title, a sand or silt bar began to form in the river opposite his land. This formation originally was entirely separate and distinct from the land of the plaintiff. As time went on its outlines changed and it was enlarged by accretions, until its growth gradually closed up the stream or channel between it and the shore. In Iowa the state owns the beds of the navigable waters within its boundaries. We quote at length from the opinion in this case, because so pertinent here:

"As this island, then, was formed on the bottom of the river, connected in no way with the shores, it would seem that title continued

in the state. It rests on soil which, when beneath the surface of the water, belonged to the state, and, if no longer its property, when was the title divested? The moment the bar appeared above the surface of the water? If so, who acquired it? Surely not the plaintiffs, for at that time a stream 40 or 50 rods wide separated it from their land. And its separation is still marked by a distinct channel to which the waters gradually receded up to 1887, and through which they still flow at the annual freshets. Nor do we think there is any ground for supposing title to shift as suggested. True, Lord Coke referred to what he designated a 'movable freehold', as where the owner of the seashore acquires or loses land as the sea recedes or approaches. See Kent, Com. 11th Ed. 547. In that sense title to land bordering the Missouri river may be said to be movable, for no one at night may safely predict what will be his boundary line the next morning. The state may lose part of the bottom of the stream by accretions to the riparian owner's land, or by reliction. But this is because it occurs through these processes, for the state is governed by rules applicable to the individual owner. That the state acquired title to the soil at the bottom of the stream previously belonging to Nebraska or to private owners, furnishes no ground for depriving it of the property it held. As well say, because of plaintiff's acquiring a large body of land by accretions, they should be dispossessed of that previously owned, or divide it with adjoining owners to the east. The theory of appellants seem to be that, as they may be losers by a future change in the river, this land should be wrested from the state to compensate them for such possible loss. This would be robbing Peter to pay Paul.

There is no more reason for saying the state loses title to an island when connected by accretions to the shore than to say title to an islet formed at one side of the thread in an unnavigable stream is lost when connected with another's land on the opposite side. The thought that title swims out from under an island as new bottom is acquired, is not founded on any sound principle of reasoning. Title is never lost or found in any such evanescent manner. As said in Benson v. Morrow, 61 Mo. 347, the owner of contiguous land is not 'the owner of an island that springs up in the midst of the stream, whether the island be on one side or the other of the thread of the river. He goes only to the margin of the river.' It would also logically follow that if, by accretions to such island, the water margin should unite with the shore, the newly made land would become a part of the island, and the riparian ownership would not be extended. In Cooley v. Golden, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 104, the same court, after referring to previous decisions, declared that 'it makes no difference in principle that the islands in these cases had been surveyed and disposed of by the United States. The riparian owner would not take the accretion, for the reason that it was not added to his own land. Pole island sprang up in the midst of the stream, far enough from the shore which bounded plaintiff's land to admit at times of the passage of boats between it and the shore. The banks of the island and that of the north shore of the river afterwards united by accretions formed by the washings of the waters, and plaintiff was only entitled to such part thereof as was formed upon his land.' This was followed in Perkins v. Adams, 132 Mo.

131, 33 S. W. 778,— a case in its facts much like the one at bar,— where it is broadly stated that, if the disputed ground was 'not formed to the land on the bank of the river by gradual accretion of land thereto, or by a gradual reliction of the adjoining bed of the river by the receding of the waters, then he (plaintiff) is not entitled to recover, whether the lands be called an island, or a sand bar, or other designation.' The same principle is perspicuously stated by the court of civil appeals of Texas in Victoria v. Schott, 9 Tex. Civ. App. 332, 29 S. W. 681, which we quote with approval: 'The uncontradicted evidence shows that the land thus claimed to be an accretion was formed in the stream as an islet, and that the stream for many years after its formation ran on each side of it. Four or five years since, the water receded from that division of the bed which lay between the islet and the plaintiff's land, and has, since such recession, flowed entirely through the channel east of the islet. Such recession did not change the title to the soil in the islet as it was before. Upon the formation of the islet, the title to it vested and was not changed by the change in the river, as that was not a gradual and imperceptible accretion. The islet, when formed, was an accretion to the soil in the bed of the stream, and the owner of such bed became the owner of the accretion. In navigable streams the soil, and hence all islands formed upon it, belong to the sovereign'."

Bouchard v. Abrahamsen, et al., 160 Cal. 792, 118 Pac. 233, involved a dispute as to the ownership of a formation in the navigable waters of a river in California, variously described as an island,

sand bar, accumulation, etc. The defendant claimed that this formation finally became attached to the main land and thus became by accretion a part of his property as upland proprietor. The court said that if it was not a true island, it certainly was an accumulation in the bed of the river, original title to which belonged to the state, and that if, in the course of time and by the process of shoaling, such island or accumulation became attached to the mainland, the patent to the defendant calling for the meander line of the south bank of the river would not and could not be stretched so as to include this accumulation; and, said the Court:

> "The utmost that defendant could claim in such a case would be the extension of his line to the part of the last vestige of the channel between the island and his land, the accretions of the island belonging to the island, and the accretions upon the south bank belonging to the mainland. * * * Again, it is equally well settled that the accretions to such island or accumulation become a part of the island or accumulation itself."

Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, contains a very elaborate discussion of the law of accretions as applied to the mainland, islands, sand bars and other formations. We quote the following from the opinion (6 L. R. A. (N. S.) 162, at 178):

> "The defendants argue that the so-called island was a mere sand bar; that an island, to

> be worthy of the name, must have become elevated above the bed of the stream far enough to make it fit for agricultural purposes, and that the riparian right of accretion can attach to nothing less dignified. It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. Cooley v. Golden, supra; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; Perkins v. Adams, 132 Mo. 131, 33 S. W. 778; Hahn v. Dawson, supra; Moore v. Farmer, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493; Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; Holman v. Hodges, 112 Iowa 714, 58 L. R. A. 673, 84 Am. St. Rep. 367, 84 N. W. 950. Before it will support vegetation of any kind, a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon its borders would make it more valuable, no reason is apparent why the law of accretion should not apply."

People v. Warner, 116 Mich. 228, 239, 74 N. W. 705, was an action in ejectment by the state to recover possession of certain lands claimed by it as an accretion. The Court, in part, said:

> "The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the lakes, or their

trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there and there that of the state begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation. The right of navigation is not the only interest that the public, as contra-distinguished from the state, has in these waters. It has also the right to pursue and take fish and wild fowl, which abound in such places; and the act cited has attempted to extend this right over the lands belonging to the state adjoining that portion of the water known to be adapted to their sustenance and increase.

"Upon the subject of accretions, we understand the law to be that additions to the land of a littoral proprietor by the action of the water, which are so gradual as to be imperceptible, become a part of the land, and belong to the owner of the land, but, when not so, they belong to the state. So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner; but if an island should first arise out of the water, and afterwards become connected to that of the private proprietor, it would not thereby become the property of such person, but would belong to the state."

## EVIDENCE DISCUSSED

The maps in evidence, made by government engineers (Govt.'s Ex. 1), tell the story simply and graphically. They could not be conveniently made a part of the transcript because too numerous and too large. Two additional duplicate sets have been prepared and by stipulation of counsel, will be transmitted to the court for the use of its members in the consideration of the case.

A number of photographs, taken at different times during the past three or four years, also give a very excellent visual picture of conditions (Deft.'s Exhibits 14 to 18, and Exhibit 19A, 19B, 19C and 19D, Tr., pp. 285 to 289).

An examination of these maps will show that in early years conditions in the estuary of the Columbia River and oceanward for some distance, were very unstable. The main ship channel passed to the north of Sand Island and through the Baker's Bay area. There were no jetties or other structures to confine and thus accelerate the currents, or protect the mouth of the river from the full sweep of storms. The vast accumulation of sand and silt some miles out in the ocean beyond the mouth of the river, known as the Columbia bar, had not yet been dredged or cut away by the

confined and swifter currents of later years. There were no channel improvements or maintenance. The normal flow of water in the river carried down vast quantities of material which were greatly added to by seasonal freshets. As a result, there were frequent shiftings of large quantities of sand and silt.

The south jetty was substantially finished in 1913, although improvements and additions have been made since (Tr., p. 231). The north jetty was substantially completed in 1917 (Tr., p. 231), although it has been improved and extended since then. Dikes and revetments have been built from time to time. Channel improvements have been made. There has been constant maintenance work carried forward. All these factors have tended to stabilize conditions.

In this suit we are only concerned with the conditions in later years. Specifically we are concerned with the question: Who owned certain lands in 1931, 1932, 1933, 1934 and 1935. The appellee alleges that during all of that time it was the owner of the premises in controversy, that during the last three years enumerated, appellants trespassed upon and carried on fishing operations on the disputed property.

The 1920 map shows the outlines of Sand Island substantially as they have since existed, except that after 1920 there was a substantial erosion and re-

cession of the west and southwest shore line of the island opposite the land in dispute. This map also shows a considerable body of land built out south and southeasterly from Cape Disappointment and the north jetty. The 1921 map shows this same body of sand and also another body of sand above low water farther to the south and east. It will be observed that the charted channel into Baker's Bay is close to Sand Island and between it and the lands referred to on both maps. The median line of this channel, under the decision in Washington versus Oregon, probably would be the boundary line between the two states. The 1922 map shows a further growth of this body of lands, which it will be observed, are designated as Peacock Spit on these maps. The charted channel is close to Sand Island and between it and these lands. The 1923 map shows a still farther growth of these lands to the south and east, with the channel somewhat narrowed and still along Sand Island and between it and these lands disputed as Peacock Spit. The attention of the Court is invited to a cross shown on the 1923 map, which is about at the southerly tip of Peacock Spit. The 1924 map shows a further building up of Peacock Spit to the south and east, and the point indicated by the cross is now surrounded by land above low water. The channel has been pushed closer to Sand Island. On the 1925 map, Peacock Spit is not substantially changed

in outline, but a considerable part is above high water. On the 1926 map, Peacock Spit still maintains substantially the same outline as on the 1924 and 1925 maps, and there has built up a smaller body of sand still farther east and near the tip of Peacock Spit. However, it will be observed that the channel is not only between Sand Island and Peacock Spit, but between Sand Island and this isolated body of sands. In 1927, about the same situation is shown. It is probable that there was very little water at low water between Peacock Spit and this isolated body of sands referred to, as it was not charted. This means that where clear water is shown without any soundings, it may be that low water is one inch, two inches, or three inches, a foot, or any other depth. It simply indicates that the land is not exposed at low water. The 1928 map shows some diminution in the size of the isolated tract of sand, but the channel is pushed close against the shore of Sand Island. Nineteen hundred and twenty-nine was the year of the big storms. The "North Band" went ashore on Peacock Spit in February, 1928, and lay there until February, 1929, when it was driven through the Spit by the fury of the storms, about where the cross cut channel is shown on the 1929 map. The ship channel is still close to the shore of Sand Island. Evidently a part of the surface of Peacock Spit was severely swept by these storms, and some

of it washed down below water. The 1930 map shows an east and west gash or channel across Peacock Spit, without any soundings. This would mean that the water was not deep enough to accommodate water craft, but that the soil beneath the water was not actually exposed at low water. It will be particularly observed that the charted channel is close to Sand Island. That part of Peacock Spit south and east of the transverse uncharted channel is partly above high water, and is the land in dispute in this case. The cross referred to above is now in the center of that part of Peacock Spit, and above high water. The 1931 map shows substantially the same situation as the preceding map, except that the transverse channel, still uncharted, has taken a somewhat northeasterly and southwesterly direction. The cross is about in the middle of that part of Peacock Spit south and west of the uncharted channel, and this area constitutes the premises in dispute. The charted channel is very close to Sand Island and the body of land constituting the premises in controversy, by a process of accretion, has built south and east toward Sand Island. Sand Island, in the meantime, has been, in fact, receding. The 1932 map shows the same relative positions. The premises in controversy are still separated from Sand Island by a channel. However, on this map neither the channel close to Sand Island nor that cutting across Pea-

cock Spit, is charted. The 1933 map shows several changes. The transverse channel, the one which cut Peacock Spit in two, is now charted. The area in controversy has at one point joined Sand Island and it is obvious that this was the result of the building up of accretions to this area, and not to Sand Island. There is still clear water and a channel between Sand Island and this body of land extending from the most westerly dike westerly for a distance of six or seven thousand feet. The 1934 map shows substantially the same condition.

In 1934, appellants carried on fishing operations on the land in controversy. The dock which they used was built under the lease from Washington on this land and projected north into the channel between it and Sand Island, and the boats used to carry away the fish reached this dock by a channel which went in between the easterly tip of the land and the most westerly dike, and thence along the channel between this land and Sand Island. We submit that these maps show conclusively that the premises in controversy are not an accretion of Sand Island.

We will now refer to some aerial photographs which supplement what is disclosed by the maps. It was impracticable to incorporate these maps in the printed transcript. The original and two duplicate sets will be made available to the court in the consideration of this case.

Defendants' Exhibit 15 (Tr., p. 286) was taken graph taken at 11:50 A. M. on July 10, 1928. To the upper left hand corner is the north jetty and the sands which have built up in its lee. To the right are Cape Disappointment and Peacock Spit, Sand Island, and, farther to the north, Baker Bay.

Defendants' Exhibit 15 (Tr., p. 266) was taken at 11:14 A. M. on April 19, 1930. In the foreground is the north jetty, and beyond is Cape Disappointment. Peacock Spit is shown extending southerly and easterly of Cape Disappointment, with the transverse channel across it, and beyond is Sand Island, with a clearly defined channel between it and Peacock Spit.

Defendants' Exhibit 16 (Tr., p. 286) was taken on May 4, 1931. It shows the north jetty, a part of the mouth of the Columbia River, Cape Disappointment, the transverse channel cut across Peacock Spit about where the "North Bend" went through, below that to the south and east the premises in controversy, and beyond that, Sand Island.

Defendants' Exhibit 17 (Tr., p. 287) was taken on the same day, about the same time as Exhibit 16. It apparently was taken from a point some distance out beyond the jetties. It shows the mouth of the river and both jetties. To the left, it shows Cape Disappointment, the transverse channel re-

ferred to, below that, the premises in controversy, Sand Isand, and the channel between Sand Island and the premises in controversy.

Defendants' Exhibit No. 18 (Tr., p. 288) was taken on the same day and about the same time as the preceding pictures. It is a close-up view of the tip of Cape Disappointment, the transverse channel which cut across Peacock Spit in 1929 and 1930, the premises in controversy below this channel, Sand Island, and the channel between it and the premises in controversy, and beyond, the Baker Bay area.

Defendants' Exhibit 19A, 19B, 19C and 19D (Tr. p. 289) is made up of four photographs joined together. Each photograph gives a close-up view of part, and the four together, give an excellent picture of the situation as it existed when the photographs were taken on October 1, 1933. To the right is that part of Sand Island north and west of the most westerly dike. In the lower right hand corner is shown the westerly dike which extends out from Sand Island, twelve hundred feet or more. Extending from this dike in a northwesterly direction is the channel which separates Sand Island from the premises in controversy. The white areas on Sand Island and on the body of land referred to as the premises in controversy, indicate land above high water, or what is called dry sands. It was during this year that the area in dispute and Sand Island

joined at one point by accretions to the former. The two bodies of land have joined for a distance of about 1000 feet, and there still remains a channel between them for a distance of over 6500 feet. The fishing operations, carried on in 1932, 1933 and 1934, were along the ocean side of the area in dispute. The buildings to house and otherwise accommodate the men and to shelter the horses used in these fishing operations, were constructed on this land. The dock used in the operations was built from this land northeasterly into the channel between this land and Sand Island. Up to and including the fishing operations of 1934, the boats reached the dock through the channel between this land and Sand Island.

On this composite picture, the dark area in the upper left hand part is Cape Disappointment. Projecting at right angles from Cape Disappointment, at the upper left hand corner, is the north jetty. The white, wavelike lines running from the upper left hand corner down towards the lower right hand corner, were made by the break of the waves or surf on shoals or the shoreline.

None of these photographs was taken at low tide. They were taken at from ten minutes to twenty-three minutes either before or after low tide (Tr., p. 308).

If more was needed to show conclusively that the premises in question are not an accretion to Sand Island, and that appellants engaged in no fishing operations on Sand Island in 1932, or subsequent years, it will be found in the testimony of all the witnesses who testified on the subject. The testimony of the witnesses will be briefly reviewed in the order in which it appears in the transcript. For the convenience of the court and with the hope that it will facilitate its labors, we have separated from a mass of evidence regarding winds and waves and conditions of many years ago, and set down on the following pages, the testimony directed to the issue involved.

Mr. Lewis, an engineer, was a witness for appellee. He testified at considerable length regarding conditions as they existed for about one hundred years prior to 1920. He presented a map or chart, showing the westerly and northerly movement of Sand Island for a number of years prior to 1920. However, he admitted on cross-examination, that this movement of Sand Island stopped about 1920, and from that time on by erosion and washing away Sand Island receded towards the east. In other words, it was receding from and not building toward Peacock Spit and the premises in controversy. He testified (Tr., p. 112):

> "Q. Well, is it, or is it not a fact, that beginning on maps immediately following the ones

you used, this so-called westerly movement ceased, and the west end of Sand Island washed away and receded towards the east?

A. Yes; that is correct.

Q. Why didn't you put that on the map?

A. Because it is apparent from — clearly apparent from the maps; because the movement is not so gradual as in those years, and is easily discernible by looking at those other maps."

Mr. Parker was a witness for the government. We quote the following from his testimony (Tr., pp. 137-138-139-140):

"The last time I fished in the lower waters of the Columbia was in 1929. At that time I fished in the Fall on Site No. 2 on Sand Island, with Mr. Smith. It was a drag seine operation. Mr. Smith was foreman of Mr. Barbey. (Explanation: This operation was carried on under a lease with the United States of Sites 1, 2, 3, 4 and 5, on Sand Island; Tr. 100). At that time I remember the Columbia River Packers' Association was carrying on drag seine fishing across on Peacock Spit to the west and a little to the north. The drag seine operations of the Columbia River Packers' Association at that time were over on the sands somewhat to the west of Site No. 2. * * *

"At that time, the Columbia River Packers' Association had structures, such as a dock, mess house, barns, etc., on these sands, to house the men and horses. Boats operated by Columbia River Packers' Association went to these fishing operations to carry the fish over to the packing house at Astoria. These struct-

ures, or particularly the dock, projected over these sands into the channel between these sands and Sand Island, and the boats coming from Astoria to carry supplies in and fish out went down the channel between Sand Island and these sands. The channel was rather close to the shore line of Sand Island in 1929. I was down there in 1930. * * *

"The fishing operations I saw in 1934 were carried on from down here to here, the length of the beach (indicating). That would be south of the lagoon, and the buildings used in connection with these fishing operations were where I have marked with a spot, and that was south of the lagoon. It was across the lagoon. You would have to look across the lagoon to the north and east to see the high water line on Sand Island. The structures used in these fishing operations projected out into the lagoon. There was a bunk house, a mess house, I should judge, and the dock projected out into the lagoon. The boats reached the dock through the channel between the sands upon which these structures stood and Sand Island, and came into the channel a little to the west of the most westerly dike and then proceeded up to the dock.

Q. And the dock was built into the land—the dock was built so that it projected eastward and northward into the water?

A. A little north.

Q. And the dock didn't reach what you call high water mark on Sand Island?

A. No.

Q. In other words, the boats came in that channel along the south shore of Sand Island and tied up to the dock?

A. Yes.

Q. And was plenty of water between that and Sand Island, proper, for the dock—the boats to tie up to the dock?

A. Yes.

Q. Load and go out through the same channel?

A. Yes.

"These boats were what is called fishing tenders, about sixty feet long, with a beam of about fifteen feet and draft, when loaded, of 7½. I was only down there once in 1934, and only observed these fishing operations for about an hour, which was in the month of August."

Lars Bjelland was a witness for the government. We quote the following from his testimony (Tr., p. 141):

"I observed drag seine operations in 1932 below the lower dike and in the general vicinity of the area circumscribed in red on the 1934 map. I can't say exacty how long these operations continued, but I should say from the latter part of June until August. I observed drag seine operations on the same premises in 1933, and again in 1934. The drag seine operations I have referred to were carried on in 1932, 1933 and 1934, upon the sands that I have indicated. * * *

(Tr., p. 141):

"I located some fishing operations on the sands south of Sand Island on the 1934 map. Assuming this map is drawn to its scale of about a thousand feet to a quarter of an inch, these sands are about 1500 feet south of the high water mark of Sand Island. The seines

were being dragged in or landed on the southerly or ocean side of these sands. The structures that were being used in connection with these operations were on the sands, and probably at least a thousand feet away from the white line marking the south point of Sand Island, of the high water mark, and these structures consisted of a mess house, bunkhouse, accommodations for horses, etc. The dock which served these operations was built out on these sands and projected **northward toward Sand Island.** The boats which came in there to serve these operations came into the channel between these sands and Sand Island.

"I spoke of some piling. This piling is considerable to the west of where the fishing operations were being carried on in 1934. The old piling may have been driven some years ago and was used in connection with securing their barges.

Q. Do you remember, as a matter of local history down there, that as these sands shoaled up and pushed towards Sand Island, that dock which was inshore between the sands and the Island, got sanded up?

A. Yes.

I don't remember how many docks were built, but I do remember there were two or three?"

Mr. Woodwoth was a witness for the government. We quote the following from his testimony (Tr., pp. 154, 155):

"I saw fishing operations in 1934, but do not know who were carrying them on except by hearsay. In connection with these fishing operations I saw on the sands where the fish-

ing operations were being carried on permanent structures such as buildings, docks, etc. I do not recall whether I saw them in 1933, as I came back to Point Adams Station in November or December of that year, but I did see them during the fishing season of 1934. I never was at the buildings. Probably was within a half or a quarter of a mile of them. I don't know how late in the season of 1934 these fishing operations continued after August 25th. They were drag seine operations, and the drag seines were being landed on the south shore of the sands. The structures were up further to the north on the high sands. These high sands where the structures were located would be about 2000 feet south of this white line on the 1934 map, that marks the high water line of Sand Island. I am not familiar with the dock which was used in connection with these fishing operations in 1934, and I do not know how the fish was handled after the nets were drawn in on the south shore of the sands. I know nothing about the fishing operations there in prior years."

Mr. Aho was a witness for the government. We quote the following from his testimony (Tr., pp. 158, 159):

"The last time I saw drag seine fishing on those sands lying south from Cape Disappointment and **west of the channel, was last year.** The operations were being carried on by the Coumbia River Packers' Association and Barbey. **I am now referring to the sands south of Sand Island. * * ***

"The sands south of Sand Island were fished during the year 1931. The fishing started in

June and ended the 25th of August. It was right from here down (indicating) that the fishing operations were being carried on in 1934 by Columbia River Packers' Association and Barbey. I refer to an area here on the sands south of Sand Island. I don't know the distance, but I know that they fished there; as far as the sand went down, they fished. This would comprise practically all of the edge of the sands west of the dike leading out into the ocean, and the southerly edge of the sands —the entire length there. I observed some fishing activities at these same locations in 1933 by the same parties and carried on about the same period; that is, from June until the 25th of August.

"I am familiar with the location of some piling on the sands south of Cape Disappointment and Sand Island. I am indicating on the 1934 map the point where these structures were used to receive fish. The point which I locate is a trifle to the west of the intersection of a cross on the 1934 map which is immediately south of the word 'Sand', and that cross, I think, is on every one of these maps. There were two different constructions, piling, driven in the sands. They extend above water at low tide and also high tide. The other structures on that body of sand lying south of Sand Island are piling driven into the sand where there had been seining houses, about midway; that is on the lagoon side; about midway from the west dike or jetty on a straight line to the mark I made before. These piling were put in to receive the fish when they were seining on the spit and are now in the same location as when they were first placed. * * *

(Tr., p. 161):

"My home is at Ilwaco, and I mostly use the North Ship Channel in going out to the Columbia River to lay out my nets; I mean by this, southerly and southwesterly of Sand Island. I have been using that channel for about 15 years. Sometimes we would not use it because it was too rough. I am not using the channel that the 'North Bend' cut through; I am using the channel right southwest of Sand Island, the old ship channel, they call it. It is not where the 'North Bend' came through; the 'North Bend' came through about one-half or one mile away. * * *

(Tr., p. 162):

"The drag seine operations that I referred to in 1933 and 1934 were carried on west of the westerly dike. The sands didn't reach out beyond the most southerly extremity of the dikes, but the seines did. The seines were landed on sands that were directly west of and below the dike. * * *

"The mess houses were along here (indicating). These structures were all southerly of the white line on the map which has been said marks the southern boundary of Sand Island. The mess house and structures and dock were all considerably south of that white line and south of the lagoon. The boats which brought in the supplies and carried out fish, reached the dock from below the western dike.

"They couldn't get in with big boats; it was too shallow, and they put a skiff and small boats in that low water. In 1934, they had a small cut or channel in there that they

went in as far as the pilings and they had a scow and they would haul out with the scow and the launch would pull them away. They approached the dock on water which was between the sands and this white line of the Sand Island in 1934. * * *

(Tr., p. 166):

"The fishing operations that were conducted in 1932 were on the same sands as in 1934."

Mr. Glasgow, an engineer, was a witness for the government. We quote the following from his testimony (Tr., p. 171):

"The 1932 map shows a body of sand that lies on the river side of Sand Island and is cut off from Sand Island by a channel, and it is also cut off by another channel into Baker's Bay. From the east end of that detached body of sand are nine or ten soundings, to a point opposite the west end of it. * * *

(Tr., p. 180):

"The 1923 map, which is the first one I made, shows the channel between Sand Island and Peacock Spit, in substantially the same location as on the 1922 map, except that it has moved a little to the eastward, and this sand between high and low water on Sand Island is narrower; shows the channel encroaching on Sand Island and Peacock Spit has built a little further eastward in two years, moving towards Sand Island. On the next map, Peacock Spit, above low water, is about the same as on the preceding maps. The channel between Peacock

Spit and Sand Island is substantially the same, except it is still moving a little eastward towards Sand Island, with a recession on the part of Sand Island, with a depth of water up to 25 feet. The next map shows the channel substantially the same as on the preceding maps. It shows a little projection on Sand Island, which has the effect of an erosion; Sand Island is eroding off on the Peacock Spit side, and Peacock Spit is building out towards Sand Island. * * *

(Tr., p. 184):

"The 1930 map shows the channel next to Sand Island with a small channel branching from it and the new channel farther north and cutting across Peacock Spit. The channel next to Sand Island was sounded, but not the one across Peacock Spit. Peacock Spit was flattened out and enlarged on this map, but covers the same area towards Sand Island. Sand Island is shown on this map as still receding towards the east. To my knowledge, it has been doing this all the time I have been there. During this entire period, Sand Island has been eroding, and Oregon Sands, or Peacock Spit, have been following it up. I never knew the sands as 'Oregon Sands', but I understand what is meant by the question. * * *

(Tr., p. 185):

"The channel next to Sand Island was the only navigable channel at that time, and for that reason, it shows soundings, and the channel through Peacock Spit was not sounded as it was not deep enough for navigation, except in emergency. The sands extending out from Peacock Spit are still growing eastward, south

of Sand Island, and parallel to it, and in the 1932 map, it is not only growing against the west shore of Sand Island, but along the south shore and that is the body of sands I have previously mentioned as being a part of Peacock Spit."

Mr. Rogers was a witness for the government. We quote the following from his testimony:

(Tr., p. 191):

"I did not observe any seining operations on these premises in 1932 or '33. I was not down in that vicinity in those years while seining was being conducted, and I don't recall that I was down there in '30 or '31. I probably was, but I have no recollection. * * *

(Tr., p. 195):

"The next operation that I recall was in 1934, which extended westerly from the most westerly dike down across the sands which are marked here in red, to a point on the map where there is a figure '6'. In other words, covering these sands (indicating), covering the area which would be westerly from the most westerly dike. * * *

(Tr., p. 197):

"That is to say, the operations I saw prior to 1934 were along the shore of Sand Island easterly of the point where the most westerly dike is now located, and the fishing operations I saw in 1934 were westerly of the most westerly dike. At the time the fishing operations were being carried on on Sand Island, between 1925 and 1930, I knew that Columbia River Packers' Association was carrying on fishing

operations on Peacock Spit.

Q. Mr. Barbey was carrying on fishing operations on Sand Island easterly of where the dike is now located, and the Columbia River Packers' Association was carrying on the same type of operations, drag seine operation, on Peacock Spit?

A. That is correct.

"I never had a lease on any part of Sand Island, and I never saw a lease on any part of Sand Island that was executed."

Mr. Cherry was a witness for appellants. He represents Lloyds, the San Francisco Board of Underwriters, is president of the Port of Astoria, and of the Arrow Dock and Barge Company (Tr., p. 218). It was his company that salvaged the "North Bend". He said this ship was a four-masted sailing vessel, tonnage length of about 204 feet, 40-foot beam, and a hold depth of about 14 feet. It went ashore in February, 1928, on the ocean side of Peacock Spit, and about a year later, worked her way through the spit into the channel between Sand Island and Peacock Spit. He saw the movement, was on the ship from time to time, and kept a log book. The movement started on January 28, and ended on February 9, 1929. The point where the vessel went ashore in 1928 is shown on the 1928 map, where the words "North Bend" appear on the ocean side of Peacock Spit. She dropped into the channel between Peacock Spit and Sand Island about opposite where she went

aground. When she dropped into the channel after the movement through the spit, she was full of water and drawing about 20 feet. She was then towed to Fort Canby, a short distance north, and beached and pumped out. A couple of days later she was towed to Astoria, and the route followed was the channel close to Sand Island and inside the Peacock Spit sands. We quote the following from the testimony of Mr. Cherry (Tr., p. 220):

> "We followed the channel that is charted on the 1929 map adjacent to Sand Island. There was no other channel which we could follow from Fort Canby to Astoria at that time. The vessel had a length over all of about 225 feet. When she was towed to Astoria in February, 1929, she was drawing about 14 feet of water, and there was sufficient water in the channel to accommodate her. At the time the towing was done there was a ground swell that would increase the depth of the draft of the vessel maybe three feet, because of the rise and fall of the swells.
>
> "I would not exactly say there was a channel left where the vessel worked its way across Peacock Spit. There was a place where she went through, but you would hardly call it a channel; it was a sort of a gash in the sand.
> * * *

(Tr., pp. 221-222):

> "Q. Just what did that storm do to Peacock Spit, do you know?
>
> A. Well, it drove the 'North Bend' through and made a kind of gash there. That is about all I noticed.

"I didn't notice particularly what effect the action of the waves and storm had on the other sands of Peacock Spit. Every storm changes a little bit, but not materially. As a rule, heavy storms make some changes, but I don't think one storm would change anything. After this heavy storm the only change I noticed was that the ship had gone through the spit and there was a kind of a gash through the spit.

Q. Now describe that gash through the spit to the court.

A. Well, at high tide, the sea, when a heavy sea would pile up on the outside and kind of hurdle over and come through on the inside, but at low tide I say just like a gash in the sand; something like these things you got here, like one of these, like this one here."

Mr. McLean was a witness for appellants. He is an engineer, and from 1911 to 1914 was in charge of construction for the Federal government of the north jetty. This work included a study of the whole mouth of the river, surveys of Sand Island, Baker's Bay, etc. He left the government to take charge of reclamation work in Astoria, including the construction of bulkheads on the waterfront. Except for his period of service in the army, he has been engaged in engineering work in the Lower Columbia since 1910. He made a survey of the tide lands leased by the State of Oregon to Columbia Fishing Company in 1928. The survey was made on the ground, and he surveyed and

platted the land to low water (Tr., pp. 223, 224, 225). This lease is in evidence (Deft.'s Ex. 20), and a summary appears on page 293 of the transcript. The area then surveyed was 52.39 acres. Its metes and bounds description were given by the witness (Tr., pp. 201, 202). It is the same land that the State Land Board was proposing to advertise for leasing at the time this suit was tried (Tr., pp. 209, 210). What was done under the Oregon 1928 lease was described by a witness for the government (Tr., pp. 204, 205). The land surveyed by Mr. McLean and then leased by the State of Oregon may be located by reference to the 1934 map. It is the area enclosed in a continuous heavy red line south of Sand Island and is a part of the premises in dispute in this case (Tr., p. 201). Mr. McLean demonstrated by measurements that the west and south shore of Sand Island in the vicinity of the premises in dispute had not grown or built up by accretion after 1920, but that, on the contrary, there had been a substantial recession of the island as the result of erosion. This is in accord with the testimony of Mr. Lewis, an engineer, and Mr. Glasgow, an engineer, supra, both witnesses for the government (Tr., pp. 226, 227, 228). He said (Tr., p. 230):

> "The closest point of the sands surveyed by me in 1928 to the shore line of Sand Island, that is to the high water line of Sand Island, as shown on the 1934 map, is about 850 feet

and in a southwesterly direction from Sand Island."

He pointed out that the 1926 map shows a body of sand at about the location where he made his survey in 1928, and (Tr., p. 233):

> "The 1927 map shows that Peacock Spit maintained its same general outline except that a part of it has appeared again above high tide line. This map also shows a body of sands at the location of my survey in 1928, and there also appears above low water some sands between the area surveyed by me in 1928 and Peacock Spit. The 1928 map, compiled from surveys completed in May of that year, shows that some of these sands go below low water mark, but that there is an area above low water mark at the location of the 1928 survey. The channel between these sands and Sand Island then ranged from 12 to 17 feet."

He said that in 1929 there were some heavy storms, that there was some breaking up, and the "North Bend" was driven through the spit; that the 1929 map shows a body of sand above low water at the location of the 1928 survey, and also shows that about 20% of Peacock Spit was above high water, and (Tr., pp. 234, 235):

> "The map of 1930 shows a cutoff gap or gash through the spit where the 'North Bend' went through. That is uncharted; that is, there are no soundings. This map shows sands above low water in the location surveyed by me in 1928. The navigable channel is east of these

sands, between them and Sand Island. There is a channel with no soundings in it between these sands and Peacock Spit; that is, there is some open water there. Peacock Spit is consolidated again and is growing together with these sands I surveyed in 1928; both of them are growing larger.

"Turning to the 1931 map, we note this cutoff gap or channel about where the 'North Bend' went through, which is still uncharted, and that part of Peacock Spit south of this cutoff channel has combined with the area surveyed by me in 1928, and the charted ship channel is between these sands, including Peacock Spit, and Sand Island. The whole body of land westerly of this channel, is designated on the map as Peacock Spit, and according to this map, was all above low water.

"Turning to the map of 1932, it appears that these combined sands maintained substantially the same contour excepting that the entire body has moved easterly. The actual area is about the same, but there has been some erosion or washing off on the west and south, and they have grown or extended towards the east.

"Turning to the map of 1933, it will be seen that south of this cutoff channel, above referred to, there is a solid, continuous body of sand which, since the preparation of the 1932 map, has formed a juncture on the north end with Sand Island.

"The 1934 map shows the same general body of sand, very similar in area, except that it has moved slightly to the north and somewhat to the east.

"In 1933 there was still a channel between Sand Island and these sands, with an approach

> from the easterly end of the sands. The 1934 map, which is dated June, July and August of 1934, still shows a small gap along the side of the lower dike leading into the water immediately south of Sand Island. * * *"

He pointed out that in 1932, for the first time since 1926, as shown by government maps, the channel between Sand Island and the sands in question, was not charted. It also appears that the channel cutting across Peacock Spit to the north is not charted on the 1932 map, and (Tr., p. 235):

> "In 1929 there were soundings shown in the so-called cutoff channel, with a controlling depth of four feet. In 1930, it was not charted, nor was it charted in 1931 or 1932. It was charted in 1933, with a controlling depth of five feet; that is, five feet was the shallowest point. In 1934, it was charted with a controlling depth of six feet, and on this 1935 map, or tracing (Exhibit 5), it is not charted; that is, it has no soundings except one or two."

With reference to the land surveyed by him in 1929, and leased by the State of Oregon, he testified (Tr., pp. 246, 247):

> "Referring to the description in Exhibit 9 and to the area circumscribed by red lines south of Sand Island on the 1934 map, that area does not include any accretions, but only includes the metes and bounds description of the area as surveyed and platted by me in 1928. Of course the red lines surrounding the area do not give the metes and bounds. The

metes and bounds description appears in Exhibit 9. The red lines merely mark the exterior boundaries of the area as surveyed in 1928, and do not, of course, take into account accretions. * * *

"The area in red does not purport to show what land, if any, is above high water. It shows the land above low water."

Exhibit 9 referred to by the witness is found on page 210 of the transcript, and Exhibit 8, which is his 1928 survey note, appears on page 202 of the transcript.

Mr. Brown, a witness for appellants, is an engineer, and for many years was employed by the government on the Columbia River. Since leaving the service of the government, he has followed his profession, his work being mostly on the Columbia River (Tr., pp. 247, et seq.). His testimony corroborates that given by Mr. McLean, and witnesses for the government, with reference to the recession of Sand Island and the building up of the sands which are designated on the government map as Peacock Spit, which include the lands in controversy, towards Sand Island, resulting in a juncture at one point with Sand Island in 1933, as the result of the building up of, or accretions to, the sands, and not to Sand Island.

Mr. Pice, a witness for appellants, was employed by the Columbia River Packers' Association in 1928, 1929 and 1930, and afterwards by the

same company and Mr. Barbey as foreman in charge of the seining operations on the south side of Peacock Spit. These seining operations were on the southwesterly side of the sands known as Peacock Spit (Tr., pp. 263, 264); and (Tr., p. 265):

> "The drag seines were laid out in the waters on the ocean side. There were buildings on the spit close to the seining operations, consisting of a fish dock, mess house and barn, and other structures, in 1928. These buildings were about here (indicating) with reference to the fishing operations. They were located about the center of the sands. The dock extended from the sands into the channel between Peacock Spit and the Island. It was used for unloading supplies brought to the fishing operations and loading fish to be carried away.
>
> "In 1929 drag seine operations were carried on by Columbia River Packers' Association on Peacock Spit, about where they were in 1928. The seines were laid out in the waters on the ocean side of the spit and we had buildings on the sands used in connection with the fishing operations.
>
> "In 1930 I had charge of the drag seine operations on the spit. These operations were carried on about here (indicating on map of 1930) and—
>
> "Q. You have located a point approximately where there is an area marked out by a heavy white line?
>
> A. Yes, sir.
>
> Q. In the area marked 'Peacock Spit'?
>
> A. Yes, sir."

During these years the boats running between Astoria and Baker's Bay used the channel between Sand Island and the area designated as Peacock Spit, running very close to Sand Island, and (Tr., pp. 266, 267):

> "In 1931 I had charge of the drag seine operations which were carried on from the easterly end of the spit and running westerly along the spit. The seines were laid out in the waters and landed on the ocean side of the spit. There was a dock used in connection with the fishing operations which, as nearly as I can remember, was located a little south of the figures '5' and '6' (in the channel between the sands and Sand Island). It was a dock which rested on piling and extended from Peacock Spit or the sands we have been talking about, north into the channel between Peacock Spit and Sand Island. The dock was used to land supplies for the fishing operations and to carry away fish. The boats that came to the docks were what were called the fish carriers — about 60 feet long and about 14 feet beam, and were driven by gasoline engines. They have a draft of about eight or ten feet. These boats approached the dock through the channel between Sand Island and the sands upon which we are fishing. As a rule, the boats came from Astoria and when loaded, went back to Astoria. Some boats, of course, went through to Ilwaco, on Baker's Bay. All the boats which came to our dock, or went through from Astoria to Ilwaco used the channel which was between Sand Island and the sands upon which we were carrying on the fishing operations.
>
> "I had charge of the drag seine operations in 1932, and —

"Q. And where were they with reference to the drag seine operations of 1931?

A. A little higher up, easterly, more easterly.

Q. A little higher up, but more easterly?

A. Yes.

Q. On the same general body of sands?

A. Yes, the same body of sands.

* * * *

(Tr., pp. 267-268-269):

"I had charge of the drag seine operations in 1933, and—

"Q. And where were they carried on with reference to the operations of '32?

A. Right in here (indicating), east end of —you see, we worked up every year more. The sands kept working easterly a little more.

Q. That is, the sands kept working easterly?

A. Yes, sir; somewhere about there (indicating).

Q. Building up easterly?

A. Yes, sir.

Q. But did you work along these same sands?

A. Yes; same sands.

Q. And I presume, as usual, you laid your seines out on the ocean side?

A. Yes.

"The fish was gathered in scows the same as in 1932 and were tied up to the same piling

as in 1932, which they reached through the same channel, as in 1932, between Sand Island and the sands upon which the fishing operations were being carried on.

"I had charge of the drag seine operations in 1934, which were carried on in about the same place as in 1932, perhaps a little farther easterly. In the meantime, a dock had been constructed on these sands, on the north side of these sands or spit, which would be on the south side of the channel between these sands and Sand Island. The dock extended from the sands or spit north into the channel in the direction of Sand Island. It was built on piling and used for the loading and unloading of boats. The boats that came to this dock in 1934 were small, about 32 feet long. They came into the channel at a point near the most westerly dike which extends out from the south shore of Sand Island usually on half tide, and then reached the dock through a channel which existed between Sand Island and the spit, or sands upon which we were fishing. When the boats were loaded they went back out through the same channel and also towed the barges or scows out. The fishing operations in 1934 started about June 11 and were carried on until about August 25th. There were no drag seine operations during the fall seasons. It is customary to close down drag seine operations on August 25th of each year. In the spring we usually began somewhere around June 1st to the 10th, depending on the season.

"When the fish were landed on these sands in the drag seines, on the ocean side, they were hauled across the sands to the dock where they were loaded. An ordinary type of four-wheel

wagon drawn by one team of horses, was used in the hauling. * * *

"The fish were hauled in a wagon across the sands to the dock after being landed on the ocean side of the beach. The distance in some years would be 500 feet and some years a little more, and some years less. In 1934 we had about 84 men on the fishing operations, referred to, and about 32 head of horses. * * *

(Tr., pp. 270, 271, 272):

"In 1928 Barbey Packing Company was fishing on Sand Island. Mr. Barbey had a separate operation on Sand Island. I can't say how far the Barbey Fishing operation on Sand Island was from the operation of the Columbia River Packers' Association, of which I was foreman. I hardly think it was as much as two miles, but I never measured it, and it is hard to judge distances.

"In 1929 Barbey was carrying on an independent operation on Sand Island. I know where the westerly dike is located. I wouldn't say whether the fishing operations carried on by Barbey, to which I have referred, were westerly of where the westerly dike was later constructed. Barbey had two locations there, Sites No. 2 and 3 on Sand Island. They are the ones noted as Sites 2 and 3 in plaintiff's Exhibit No. 3. The location of the Barbey operation was on Sand Island. It probably extended easterly and onto Site 4. I am not able to say whether the 1929 Barbey operation was about a mile and a half from the operation with which I was connected, because I never measured the distance.

"In 1930 I was working for the Columbia River Packers' Association on Peacock Spit

and the fishing operations began about the easterly end of what is designated on the map as Peacock Spit, and extended westerly along the south shore. It might have been a distance of a couple of thousand feet—some years it was shorter and some years longer. I think Barbey was fishing on Sand Island in 1931. I am not sure. I think there was only one operation in 1931. * * *

"In 1932, the drag seine operations began to go farther to the east and by 1933 and 1934 we were fishing westerly from the last dike which had been constructed there. * * *

"In 1934, we went into the channel between Sand Island and the sands upon which we were fishing at about half tide, because the channel was shoaling up a bit.

"The sands of which I am speaking south of Sand Island would not be flooded with water during high tide in the summer time. I should say about half would be flooded at high tide. We are not troubled in the summer with swells and very high tides. There would be no tides in the summer that would cover these sands. There were no tides in 1934 that covered the sands, because we had buildings on there. I was on these sands until August 25th, 1934. I have not been on them this year. * * *

"During the fishing season of 1934 we kept the men and horses in the buildings on the sands.

"Q. You had buildings on the sand, and the horses were kept there?

A. Yes, a cook house and a barn.

Q. And the men were kept there, except when they went ashore Saturday night?

A. Yes."

Mr. Goulter, a witness for appellants, lives at Ilwaco and furnished horses used in the seining operations, and (Tr., pp. 273, 274):

"I furnished horses in connection with their seining operations. I furnished horses in 1928 for the Columbia River Packers' Association, probably about 80 head, for use in drag seine operations. The first time I furnished any horses to Mr. Barbey was either in 1930 or 1931.

"In 1928 I furnished horses for seining purposes to Columbia River Packers' Association on the sands that were referred to by Mr. Pice. I furnished 32 horses for this operation. They were taken over to the fishing grounds in a scow. The scow went through the channel between the spit and Sand Island. I was at these fishing operations during the summer of 1928, during all of the time my horses were there. I refer to the drag seine operations of which Mr. Pice testified. The horses were kept in a barn on the sands. There was a dock. It was built on the spit extending out into the channel between the spit and Sand Island.

"I furnished horses also in 1929. I also furnished about 32 horses to be used in the drag seine operation referred to by Mr. Pice. The operations began sometime in June and ended August 25th. The horses were kept on the sands in a barn. There was a dock used in connection with the operations, which extended northerly into the channel between the spit and Sand Island. Fish carriers and other boats came to that dock through that channel. There was also located on the sands upon which the

fishing operations were being carried on, other buildings such as a cook house, bunk house, etc. The fish were landed in nets on the ocean side of the spit, and carried across in wagons to the dock.

"I furnished about the same number of horses during the same period for the operations in 1930. The horses were kept on the sands in the same way as in preceding years and there was a dock used in connection with the operations which extended from the spit northerly into the channel between the spit and Sand Island and this dock was approached by several boats which carried supplies to, and fish away, and these boats used the channel between the spit and Sand Island. * * *

(Tr., pp. 274-275):

"I furnished horses in 1933 for the fishing operations of which Mr. Pice spoke. This year the horses were kept on the sands on Peacock Spit. They had some scows that took them over.

"In 1934 I also furnished horses for the seining operations of which Mr. Pice spoke. This year the horses were kept during the operation in a barn on Peacock Spit. The barn was on the north side of the sands and they fished a little to the west and south. The fish, when taken in the nets on the ocean side of the sands, were carried this year, as in previous years, in wagons across the sands to the dock built from the sands north into the channel between the sands and Sand Island. Supplies reached the fishing operations by way of this dock. The channel I refer to is the one between Peacock Spit and Sand Island. Fishing operations in 1934 closed on August 25th.

(Tr., pp. 275, 276, 277):

"When I furnished horses to Columbia River Packers' Association in 1928, it was fishing Peacock Spit. I am not furnishing horses to Mr. Barbey for fishing operations on Sand Island at that time. I am not able to say how far the operation of Columbia River Packers' Association on Peacock Spit was from the operation of Barbey on Sand Island. I never measured the distance. I could see the men working on Barbey operation. I am not able to say whether these two operations were as much as two miles apart. I should say maybe between one and one-half and two miles in 1928. Of course, the distance varies. In 1929 Mr. Barbey was fishing the sites on Sand Island and the Columbia River Packers' Association was fishing on Peacock Spit at the location that I have already described.

"I began leasing horses to the Columbia River Packers' Association and Barbey, combined, either in 1930 or in 1931; I am unable to say which, but I was still furnishing horses for the operation on the spit as I had before.

"Q. (by Mr. Hicks): In 1931 and '32, when you were furnishing horses for the companies combined, they were fishing the identical premises and the identical locations at that time that Mr. Barbey was fishing in 1928, while the Columbia River Packers' Association were fishing away over on Peacock Spit; is that right?

A. No.

Q. Well, now you just explain the difference.

A. Why, I don't think there were any oper-

ations carried on on Sand Island after '31. That is my recollection of them.

* * * *

"In 1928 the Columbia River Packers' Association were fishing off Peacock Spit and Barbey was fishing off Sand Island.

"Q. (by Mr. Hicks): Well, you testified that the operation in 1928 of the Columbia River Packers' Association was about between one and two miles from where Mr. Barbey was fishing at the same time.

A. That is—what? One and two miles from where?

Q. Between one and two miles, the way you put it, between the point where Mr. Barbey was fishing in '28 and where the Columbia River Packers' Association was fishing during the same year.

A. They were fishing on Sand Island and we were fishing on Peacock Spit, laying down in front of Sand Island.

* * * *

"Q. (by Mr. Hicks): Well, maybe I can make it more clear to you. I will ask you again if the premises that were fished by the combined companies in 1931 and '32 and '33—I ask you if those premises were not the identical premises, as to the location on this map, that were fished by the Barbey Packing Company in 1928?

A. No; not the way I see it.

Q. Well, can't you look at the map there and point out any difference in the location?

A. Well, no; in 1928 the Barbey Packing Company was fishing Sand Island, land on

Sand Island, and we were fishing on Peacock Spit."

Mr. Hansen, a witness for appellants, has carried on fishing operations in the Lower Columbia for many years (Tr., p. 277); and (Tr., pp. 279, 280, 281):

"I know where the fishing operations of the Columbia River Packers' Association and Mr. Barbey were carried on in 1934. I was at those operations once during July or the latter part of August. I reached the operation at that time in this manner: I took my gasoline boat and went over to the north side of Sand Island and tied up to a dock there and walked across the Island and then I had Mr. Goulter come across in a dinghy, or small rowboat, to Sand Island, and take me over to the spit where the fishing operations were being carried on. I landed on the spit close to the bunk house. I was there two or three hours. I noticed a body of water between Sand Island and the sands upon which these fishing operations were being carried on. At that time we called it a lake, or lagoon. This lake, or lagoon, is a part of the old channel which was between Sand Island and Peacock Spit, or the sands upon which the fishing operations were then being carried on. * * *

"When I made the trip in 1934 to the Barbey and Columbia River Packers' Association fishing operations, I went across from Sand Island to the sands upon which they were fishing in a small boat across a channel. I said it was about something like 60 feet wide. I couldn't say. The tide was out, and it was low water at the time. It was in the afternoon, prob-

ably 2:00 or 3:00 o'clock in the afternoon. It could have been as late as 4:00 o'clock. I made no memo at the time. It was pretty good seining tide and I was figuring on I might get some fish. But I wouldn't say just what time it was in the afternoon. The crew had just had their lunch, but that is hard to go by, as on the seining grounds they have lunch most any time of the day. It wasn't a low going out tide; it was a hold up tide at the time. I came in just about at low water. There was a small scow in there at the time. I did not see any salmon taken out of there that year, because I was only there once and at that time they were just going out fishing. When I came back from the seining grounds, I had to again go across the channel of the lagoon to Sand Island and I got a man to put me across. There was a net rack, there must have been a dock, and they were all on pilings. I wouldn't say as to the kind of buildings or whether there were any, because I don't recall. There was some kind of a floor construction on top of the piling. I was back there last week and saw some piling, but did not see any dock."

Mr. Suomela, a witness for appellants, has been local agent at Ilwaco for Columbia River Packers' Association since 1928. His duties took him frequently to where the drag seine operations referred to by preceding witnesses were carried on up to and including the year 1934, and (Tr., p. 282):

"I recall where the channel was with reference to these fishing operations. It was on the northerly side of the sands or what we call Peacock Spit, and between Peacock Spit and Sand Island. In my various trips down to the fish-

ing operations I saw boats passing through the channel. The type of boat that they used to carry the fish away from these operations was a fairly good-size cannery tender. It might have been between 50 and 60 feet in length. These boats would approach the dock through the channel between Sand Island and the sands to the south and west referred to as Peacock Spit, and on which the fishing operations were being carried on. * * *

(Tr., p. 283):

"The sands that I have been referring to as Peacock Spit are those south of Sand Island. I have always heard them called and known as Peacock Spit, and the channel I refer to is the channel between these sands that I have called Peacock Spit and Sand Island. It was used in 1932 and again in 1933. I observed that in 1933 there had been a juncture to the north of these sands with Sand Island and at this point to the north, the channel between these sands and Sand Island was closed up. However, south of this juncture there still remained the channel through which boats reached the dock on the sands and carried out fish. This channel led eastward or southeastward between the sands and Sand Island, to a point about at the westerly dike.

"The same condition prevailed in 1934 * * *

(Tr., pp. 284, 285):

"I am telling the court that the sands lying westerly of the dike and southerly of Sand Island were known to me through the years from 1930 on as Peacock Spit. I have never heard anybody call them Sand Island. I have heard that there were drag seine operations on Sand Island in 1930, 1931 and 1932. I did not

> hear of any drag seine operations on Sand Island in 1933 and 1934. The drag seine operations on Sand Island in 1931 and 1932 were not on the area designated as Peacock Spit, but were further east of them. Up in this territory (indicating) I know that there have been no drag seine operations in this territory that I have indicated on Sand Island since the dike was put in."

The dike referred to was in fact conpleted in 1932 and there were in fact, no fishing operations on Sand Island in 1932 or subsequent years.

In the light of the authorities and of the evidence just discussed, may we not ask: When does appellee claim that the premises in controversy became an accretion to Sand Island? Was it in 1923 or 1924, when, as shown by the government's maps for these years, Peacock Spit, embracing at that time, substantially all of the area in controversy, was separated from Sand Island by the only ship channel into Baker's Bay with a depth at low water ranging from 9 to 22 feet? Or in 1925, when the same conditions prevailed? Or was it in 1926, when the channel remained in the same position? Or was it in 1927, when the channel remained between Peacock Spit and also a new formation somewhat farther east and afterwards consolidated with Peacock Spit? The same condition prevailed in 1928, and also in 1929, at which time the cross cut channel appeared about where the "North Bend" went through.

On the map of 1930, the area in controversy, which is all that south and east of the cross cut channel, cutting Peacock Spit in two parts, was still separated from Sand Island by the only charted channel into Baker's Bay. Did it become an accretion to Sand Island that year? The same condition continued in 1931.

Certainly it cannot be claimed that the premises in controversy were an accretion to Sand Island up to that time. They constituted a large compact body of land, all above low water, and some above high water, separated from Sand Island by the ship channel still exclusivey used, and separated from the balance of Peacock Spit by the new uncharted channel. All this is also made clear by the maps and photographs referred to.

Again in 1932 this same body of land was separated from Sand Island by a channel. True, it was not charted that year, neither was the cut-off channel, but it was used by the boats which carried supplies to and fish from the operations, and by boats plying between Astoria and Baker's Bay points. It surely cannot be contended that it was an accretion to Sand Island at that time. The map of 1933 still shows a channel between these premises and Sand Island for a distance of about 7000 feet westerly from the most westerly dike and that these lands had joined Sand Island through

their own growth. Can it be claimed that when this juncture was made, this whole body of land became an accretion to Sand Island by slow, imperceptible deposit of particles of earth taken from one point and deposited in another, which is the test to be applied?

The composite photograph (Deft.'s Ex. 19A, 19B, 19C and 19D) shows the condition that existed in the fall of 1933. In 1934, there still existed a channel between Sand Island and these premises extending westerly about 7000 feet from the most westerly dike and this channel continued to be used by boats serving the fishing operations of appellants in 1934.

We submit that there is no basis for the claim of appellee that the premises in controversy, under the law of accretions, became a part of Sand Island at any time. They still belong either to the State of Oregon or the State of Washington, and the dividing line separating the property of appellee from that of the one state or the other, is the point at which the two bodies of land came together.

**The evidence wholly fails to sustain the finding and decree that appellants were threatening, and intended, unless restrained, etc., to go upon, or use, the premises in dispute, or any other property claimed by appellee.**

## ARGUMENT

It is undisputed that appellants ceased fishing operations on, or in the vicinity of the premises in controversy, August 25, 1934. They were not resumed. There was no effort made to resume them, and there was no intention that they should be resumed, in 1935. Because of Initiative Law No. 77, passed in Washington in November, 1934, appellants could not procure any drag seine licenses in that state. It had no lease from Oregon and could not procure any lease unless Oregon advertised some property for lease, and appellants became the highest bidders. In other words, appellants could not carry on any fishing operations under the lease from Washington, or on premises to which Washington made claim—and it makes claim to all the premises in controversy—unless the Initiative Law No. 77, referred to, is repealed. It could not carry on fishing operations on any part of the disputed premises claimed by Oregon without getting a lease for the land and a fishing license from Oregon.

We submit that there is no evidence to sustain the finding and decree that appellants were trespassing or threatening and intending to trespass, upon the premises in controversy, or any other property belonging to appellee, or to which it made claim.

We respectfuly submit that the decree appealed from should be reversed.

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